SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 21 1968
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1252

ROGER D. BRANIGIN EDWIN M. S. STEERS
THURMAN M DeMOSS
As Members of the State
Election Board of Indiana,
~~JOSEPH W. SUMMERS~~,
~~NELSON G. GRILLS~~,

Appellants,

v.

DOROTHY C. DUDDLESTON,
JOHN J. GALLAGHER, MILES H. MARSHALL,
LOUIS Y. MUNDY,

Appellees.

---

Appeal from the United States District
Court for the Southern District of Indiana

---

# STATE ELECTION BOARD'S STATEMENT AS TO JURISDICTION

JOHN J. DILLON
Attorney General of Indiana

Charles S. White
Chief Counsel - Staff

Attorneys for Appellants

219 State House
Indianapolis, Indiana 46204.
Phone: 317/633-5512

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967
No. _____

ROGER D. BRANIGIN EDWIN M. S. STEERS
THURMAN M DeMOSS
As Members of the State
Election Board of Indiana,
~~JOSEPH W. SUMMERS~~,
~~NELSON G. GRILLS~~,

Appellants,

v.

DOROTHY C. DUDDLESTON,
JOHN J. GALLAGHER, MILES H. MARSHALL,
LOUIS Y. MUNDY,

Appellees

---

Appeal from the United States District
Court for the Southern District of Indiana

---

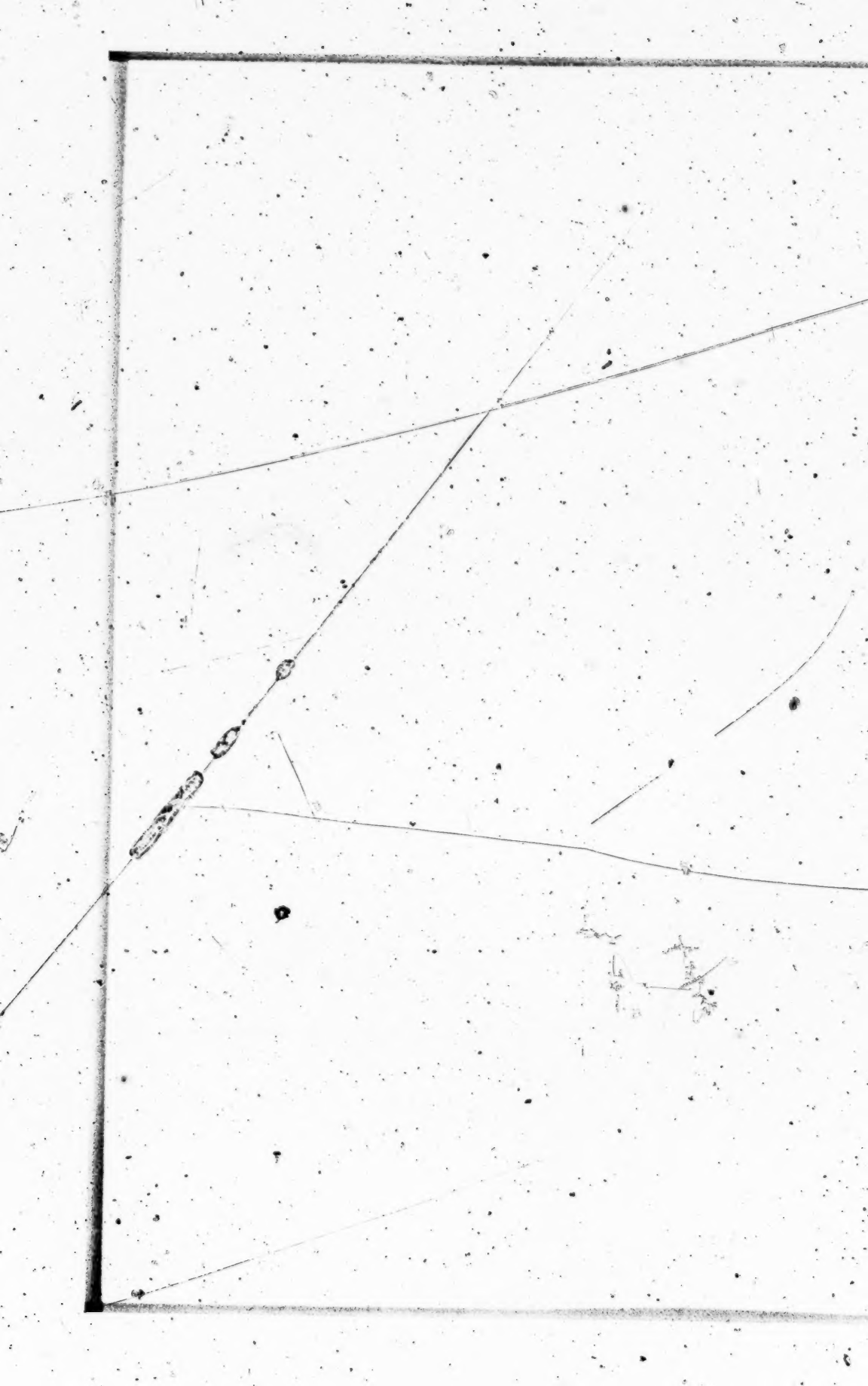
# STATE ELECTION BOARD'S STATEMENT AS TO JURISDICTION

JOHN J. DILLON
Attorney General of Indiana

Charles S. White
Chief Counsel - Staff

Attorneys for Appellants

219 State House
Indianapolis, Indiana 46204
Phone: 317/633-5512



## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 3 |
| Questions Presented | 6 |
| Statement of the Case | 8 |
| The Questions Presented Are Substantial | 15 |
| Conclusion | 42 |

## TABLE OF CASES


| | Page |
|---|---|
| Alton v. Tawes, et al., 384 U.S. 315 | 5, 18 |
| Baker v. Carr, 369 U.S. 186 | 19, 20 21 |
| Baker v. Ellington, 273 F. Supp. 174 (M. D. Tenn., 1967) | 21 |
| Calkins v. Hare, 228 F. Supp. 824 (E. D. Mich., 1964) | 22 |
| Colgrove v. Green, 328 U.S. 459 | 19, 20 30 |
| Duddleston, et al. v. Grills, et al. 385 U.S. 455 | 3, 4 |
| Grills, et al. v. Branigin, et al. 255 F. Supp. 155 (S. D. Ind., 1965) | 2, 28 |
| Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz., 1966) | 21 |
| Maryland Citizens' Comm., etc., et al. v. Tawes, et al., 253 F. Supp. 731 (D. Md., 1966) | 18, 21 |
| Park v. Faubus, 238 F. Supp. 62 (E. D. Ark., 1965) | 22 |

## TABLE OF CASES
(contd.)


| | Page |
|---|---|
| People v. Kerner, 33 Ill. 2d 460, 211 N. E. 2d 736 (1965)..... | 21 |
| Preisler v. Sec. of State, et al. (Preisler III) ___ F. Supp. ___ (C. D. Mo. 12/30/67)..... | 34 |
| Reynolds v. Sims, 377 U.S. 533 ..... | 20, 22, 39, 40 |
| Roberts v. Babcock, 246 F. Supp. 396 (D. Mont., 1965)..... | 21 |
| Swann v. Adams, 385 U.S. 440..... | 34 |
| Wesberry v. Sanders, 376 U.S. 1.... | 19 |


## TABLE OF STATUTES


| | |
|---|---|
| P. L. 90-196 (81 Stat. 581)..... | 5 |
| 28 U.S.C. § 2281..... | 3 |
| 28 U.S.C. § 2284..... | 3 |
| 28 U.S.C. § 1253..... | 4 |
| 28 U.S.C. § 2101 (a)..... | 4 |
| Ind. Acts 1965, Ch. 205..... | 8, 15, 37 |
| Ind. Acts 1931, Ch. 113, § 14 ..... | 37 |
| Ind. Acts 1935, Ch. 247, § 1..... | 37 |

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

ROGER D. BRANIGIN, EDWIN M. S. STEERS,
THURMAN M. DeMOSS,
As Members of the State
Election Board of Indiana,

JOSEPH W. SUMMERS,

NELSON G. GRILLS,

Appellants,

v.

DOROTHY C. DUDDLESTON,
JOHN P. GALLAGHER, MILES H. MARSHALL,
LOUIS Y. MUNDY,

Appellees

---

Appeal from the United States District
Court for the Southern District of Indiana

---

# STATE ELECTION BOARD'S STATEMENT AS TO JURISDICTION

The appellants Branigin, et al.,

members of the State Election Board of Indiana,

pursuant to United States Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment and decree of permanent jurisdiction in question, and should exercise such injunction in this case.

## OPINIONS BELOW

Neither the majority opinion of the three-judge District Court containing the decree or judgment appealed from, nor the dissent thereto, is yet published. Copies of those opinions are attached to this jurisdictional statement as Appendices B and C. The opinions from which the prior appeal of this case arose are reported as Grills, et al. v. Branigin, et al., 255 F. Supp. 155 (1965). The Supreme

Court's per curiam order which terminated the first appeal (by vacating that judgment and remanding the case for further consideration) is reported as Duddleston, et al. v. Grills, 385 U.S. 455.

## JURISDICTION

The appeal herein is from orders, judgments and decrees made and entered February 14, 1968, as a part of an opinion (Appendix B) signed by two of the three judges sitting as the United States District Court for the Southern District of Indiana, Indianapolis Division, specially constituted under 28 U.S.C. §§ 2281 and 2284 upon petitions to the Court to order election of Congressmen from districts to be drawn by the Court following earlier invalidation by that court on February 7, 1967 (Appendix A) of districts drawn by state legislative

enactment. The judgment appealed from created new Congressional districts and ordered the State Election Board (appellants) to conduct the election of Congressmen pursuant thereto.

The judgment appealed from was made and entered February 14, 1968. Notice of appeal was filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, on February 16, 1968.

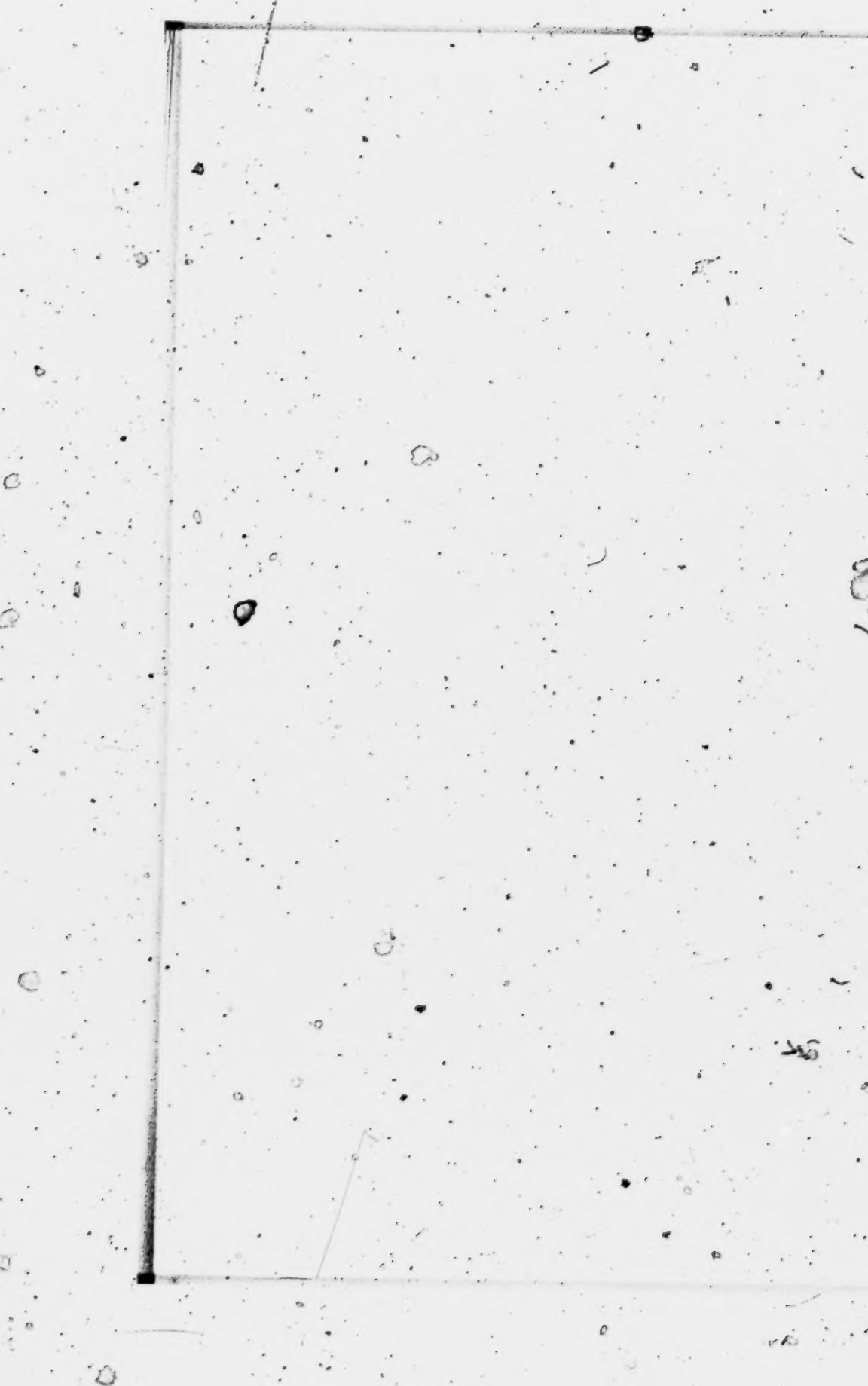
The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C. §§ 1253 and 2101 (a).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the jurisdiction on direct appeal in this case. Duddleston, et al. v. Grills, et al., 385

U.S. 455, and Alton v. Tawes, et al., 384 U.S. 315.

While counsel anticipate that it will not be an issue in this Court, the validity of P. L. 90-196 (81 Stat. 581), approved December 14, 1967, was questioned below but was not passed upon by the District Court. That statute, so far as here pertinent, reads:

> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled 'An Act to provide for apportionment of Representatives' (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that



a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)."

## QUESTIONS PRESENTED

1. Whether the District Court abused its discretion by creating Congressional Districts in which population variances between districts are greater than necessary, as illustrated by the districts proposed by the dissenting Judge and by plans submitted by the parties.

2. Whether the District Court abused its discretion by creating Congressional Districts in which achievement of the goal of population equality was subordinated to the achievement of other self-imposed goals such as compactness, preservation of the integrity of

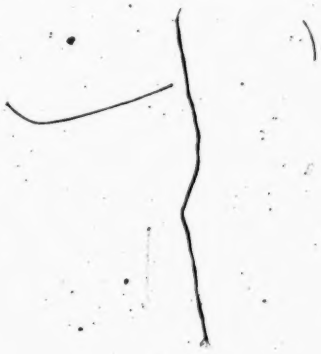
county and township boundaries, and preservation of United States Census Bureau Metropolitan Statistical Areas.

3. Whether the District Court exceeded its judicial power and usurped legislative power by drawing new Congressional Districts instead of merely making such shifts of population areas from over-populated districts to under-populated districts as were necessary to make the Congressional Districts established by the State Legislature as nearly equal in population as is practicable.

4. Whether the District Court exceeded its judicial power and usurped legislative power by presuming to establish requirements or standards, other than population equality, for Congressional Districts.

## STATEMENT OF THE CASE

Following this Court's remand (385 U.S. 455) of the case (on the [first] appeal of the holding in 255 F. Supp 155 that the 1955 Congressional districting Act [Ind. Acts 1965, ch. 205] was constitutional) the District Court, on February 7, 1967, held the 1965 Act "unconstitutional and void by reason of excessive population variances," (emphasis added) enjoined further elections under it or any prior law, and retained jurisdiction "for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the General Assembly of the State of Indiana, if any, and for such other action in the premises as may be necessary." (Appendix A.)

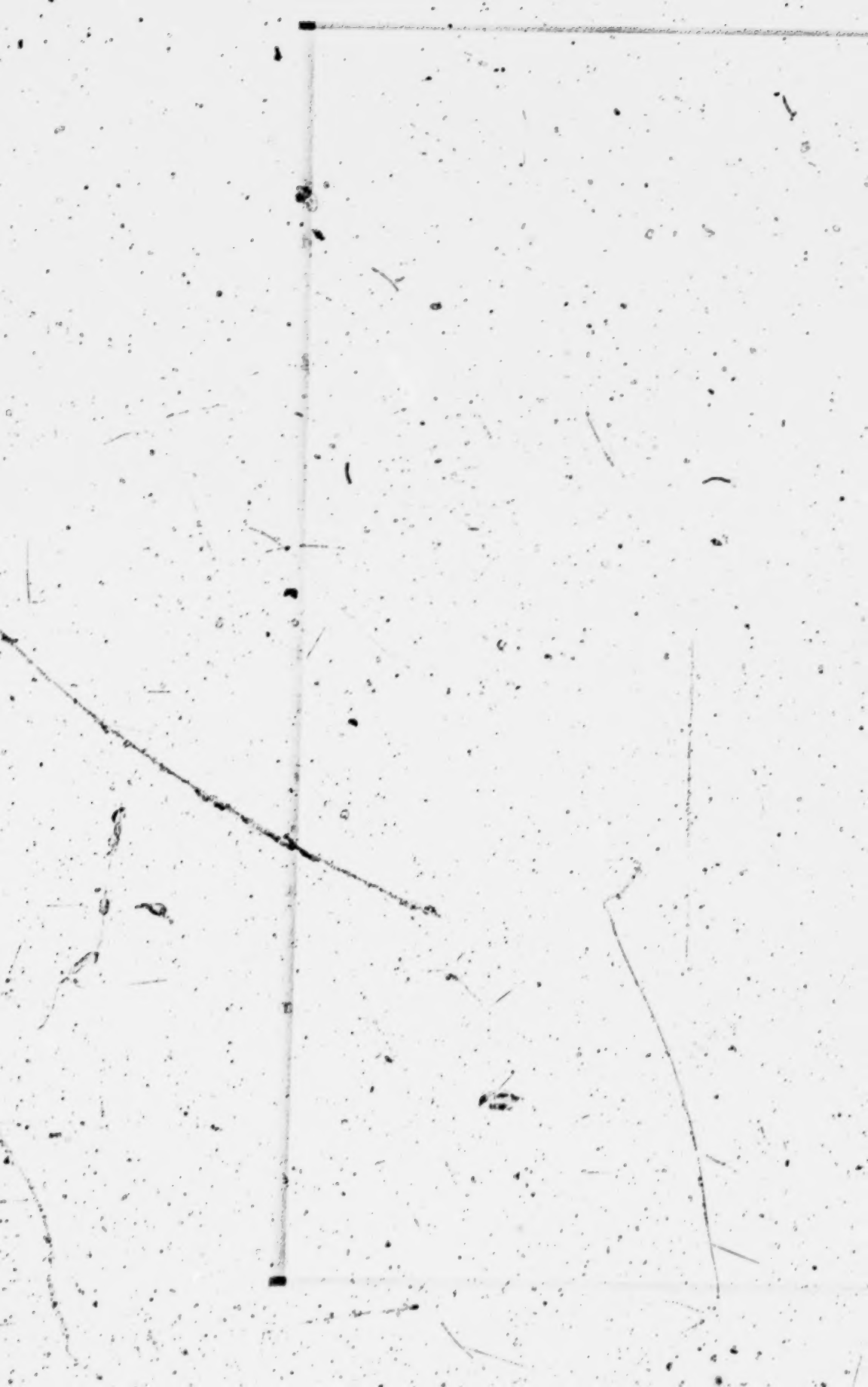


No further Congressional apportionment or Congressional districting act was ever enacted by the Indiana General Assembly, although it was in regular session at that time and for twenty-seven days thereafter. (One plan, Senate Bill 399, passed by the Democratic dominated Senate was amended into a new plan by the Republican dominated House of Representatives [as S.B. 399A]. A third plan passed only the Senate as an amendment of House Bill 1377.) Many meetings of legislative leaders, committees, and sub-committees, since adjournment, have wholly failed to reach any bi-partisan agreement on Congressional redistricting. As a consequence, the Governor has never called, and has no present intention of calling, a special session of the Indiana General Assembly.

As the result of various petitions filed by the appellees who were the first four intervening plaintiffs and the appellants in the first appeal (Duddleston, Gallagher, Marshall, and Mundy) an "evidentiary hearing" was held February 9, 1968, and on February 14, 1968, the majority opinion of Judges Knoch and Holder, drawing entirely new districts, was issued. This opinion, appended hereto as Appendix B, contains the judgment from which this appeal is taken. At the same time Judge Dillin's dissenting opinion was issued. On February 26, 1968, Judge Dillin issued a corrected dissenting opinion appended hereto as Appendix C.

Despite the fact that there was an "evidentiary hearing" on February 9, 1968, at which some testimony was received, all of the

Holder followed township boundary lines in carving the first district out of Lake County and the eleventh district out of Marion County. Both those plans constituted the other nine districts by combining whole counties, except for adding the remaining townships of Lake County to the second district and the remaining townships of Marion County to the sixth and tenth districts (1965 Act) or to the sixth district only (Court plan). There is, however, very little similarity between those two plans, as is apparent by a glance at the maps of each (Appendix B, p. 32, Appendix C, p. 33.) Judge Dillin's plan, however, (in line with the contention made in the jurisdictional statement of the then appellants, now appellees, Duddleston, Gallagher, Marshall and Mundy, on the first appeal, that adherence to county and township lines does not excuse



population variances avoidable by dividing districts on other lines; uses streets, railroads, and streams, as well as county, township and city boundaries to divide districts and achieve districts much more nearly equal than those ordered by Judges Knoch and Holder, while at the same time moving as few people as possible from the districts in which they voted in 1966, under the 1965 Act, for or against their present Congressman. (Appendix C, p. 33.)

The chart on the following page compares the 1965 Act, the Court-ordered plan, and Judge Dillin's plan as to population variances, and compares the majority plan with that of Judge Dillin also as to the number of persons added to, and the number of persons taken from, the same numbered 1965 district to constitute the ordered or proposed district.

| Dist. No. | POPULATION VARIANCE (+indicates overpopulation) (-indicates underpopulation) 1965 Act | Court Plan | Dissent | PERSONS MOVED Court Plan Added to | Court Plan Taken from | Dissent Added to | Dissent Taken from |
|---|---|---|---|---|---|---|---|
| 1 | +30,345 | +3,404 | + 48 | 12,282 | 39,223 | 0 | 30,297 |
| 2 | + 7,201 | - 636 | - 93 | 152,245 | 160,082 | 30,297 | 37,591 |
| 3 | -39,784 | -5,643 | - 68 | 147,163 | 113,022 | 39,716 | 0 |
| 4 | +27,074 | - 39 | +118 | 79,677 | 106,790 | 0 | 26,956 |
| 5 | + 2,247 | -4,098 | - 49 | 221,723 | 228,068 | 0 | 2,296 |
| 6 | +15,098 | +4,334 | - 19 | 180,873 | 191,637 | 0 | 15,117 |
| 7 | -54,200 | +2,757 | +104 | 83,593 | 26,636 | 54,304 | 0 |
| 8 | +19,389 | + 897 | +112 | 43,513 | 62,005 | 0 | 19,277 |
| 9 | + 1,070 | +1,497 | - 1 | 51,397 | 50,970 | 0 | 1,071 |
| 10 | -17,645 | -6,705 | - 83 | 148,391 | 137,451 | 17,562 | 0 |
| 11 | + 9,210 | +4,237 | - 64 | 94,749 | 99,722 | 0 | 9,274 |
| Max. +(1) | 30,345 | (6) 4,334 | (4) 118 | 1,214,806 | 1,215,606 | 141,903 | 141,903 |
| Max. -(7) | 54,200 | (10) 6,705 | (2) 117 | | - T O T A L S - | | |

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The majority judges of the three-judge District Court constructed what, by comparison with the Congressional District Act of the Indiana General Assembly (ch. 205, Ind. Acts of 1965) are almost entirely new districts. Although the 1965 districts had been declared unconstitutional by reason of excessive population variances (and for that one reason only) they did, nevertheless, in the one election in which they were used prior to being voided, prove to be fair, as between the two major political parties, in that proportional representation was achieved. In that 1966 election the total Republican-Democratic vote was 1,676,664. Of this total the eleven Republican Congressional candidates received 897,086

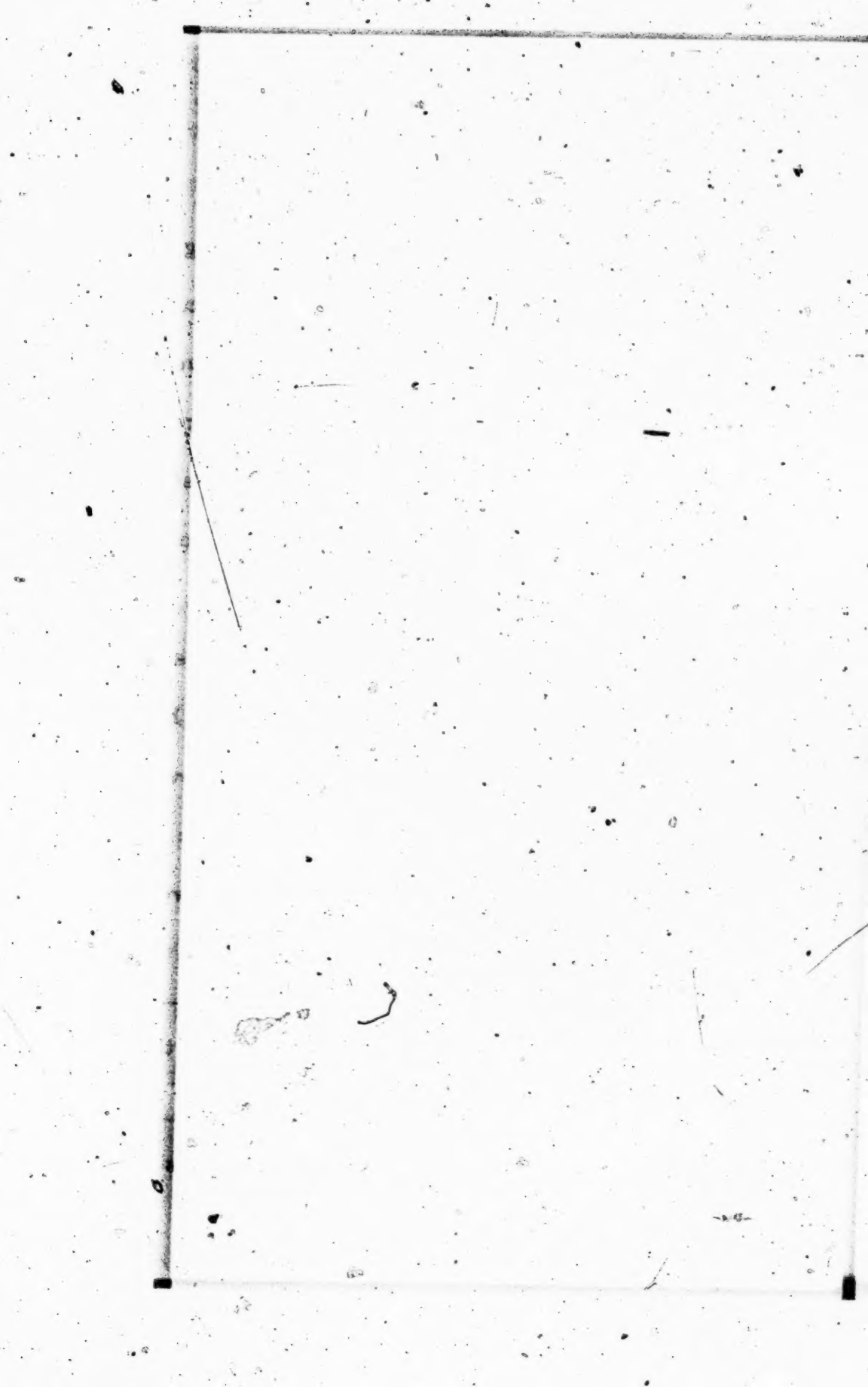
votes, which is 53.5% of that total. The Republicans elected six Congressmen which is 54.5% of the State's eleven Congressmen. The five Congressmen elected by the Democrats, being 45.5% of Indiana's delegation, is proportional to the eleven Democratic candidates' 46.5% (779,578 votes) of the total for Congressmen. (The 1966 vote for Indiana Secretary of State was 890,572 Republican and 773,375 Democratic or 53.5% Republican and 46.5% Democratic which further confirms the fairness or proportionality of the six-to-five Republican majority in Indiana's present Congressional delegation. By contrast, if the majority-ordered districts had been in effect during the 1966 elections the Republican 53.5% of the vote would have elected 63.6% (i.e., seven) of Indiana's Congressmen.[1]

1. Analysis by reporter Gerry LaFollette, published February 17, 1968, in the Indianapolis

Because the politically stalemated 1967-68 Indiana General Assembly has been unable to pass a new Congressional Districting Act to replace the 1965 Act declared unconstitutional for excessive population variances between districts, it has become necessary for the three-judge District Court, which has retained jurisdiction, to make some further orders for the conduct of the 1968 election. The District Court has made such further orders by drawing these new districts. In so doing the District Court has chosen to legislate rather than merely to provide a judicial remedy. And the legislation it has enacted is itself unconstitutional for excessive population variances between districts.[2]

1(contd.)
News, Indianapolis, Indiana. Some claim the majority plan is 9-2 Republican, he states.

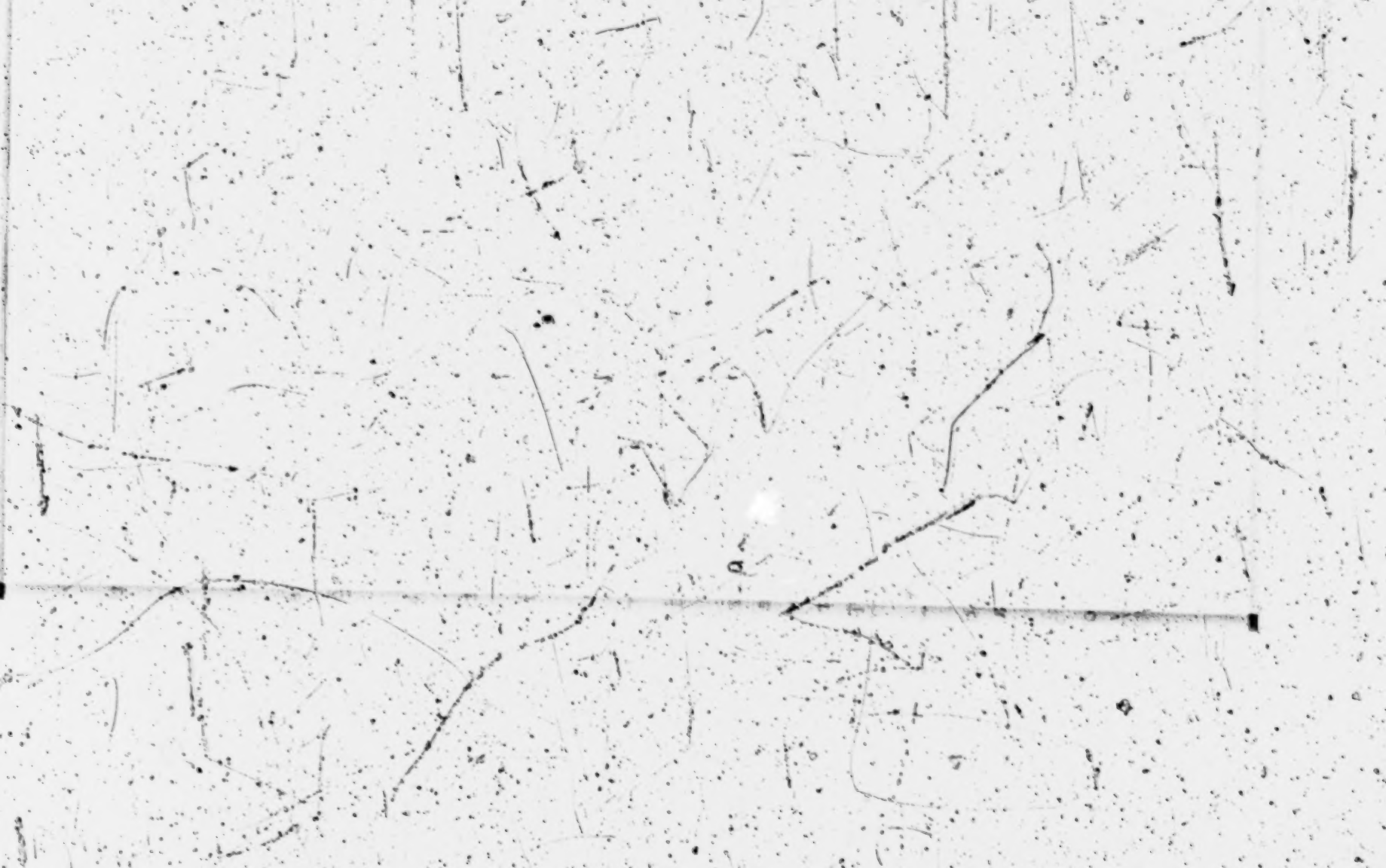
2. Not nearly so excessive as the 1965 Act, but more excessive than necessary. Witness the



This Court has never yet defined the extent of the District Court's power when faced with the necessity to provide a remedy when a State's legislature has failed to draw new districts following voiding of its old districts.[3] Nor if that power be unlimited, what limits a court's discretion in its exercise. The District Courts are wholly without direction from this Court as to the limits of their power to fashion

2. (contd.)
judicial remedy proposed by the dissenting judge whose minimal adjustments of the 1965 districts reduces the maximum variance to a de minimus of 118 persons overpopulation (Dist. 4) and 93 persons underpopulation (Dist. 2) as against the majority's maximum of 4,334 persons overpopulation (Dist. 6) and 6,705 persons under-population (Dist. 10).

3. All that can be logically inferred by reading Alton v. Tawes, et al., 384 U.S. 315, and Maryland Citizens Comm., etc., et al. v. Tawes, et al., 253 F.Supp. 731, which it affirms, is that three-judge Dustruct Court redistricting judgments are appealable directly to the Supreme Court. The



remedies (or of their discretion in its exercise) and the public is without standards by which to measure the validity of the remedies fashioned. The great public interest in and concern over the entry of the courts into this new phase of this new type of litigation is apparent.

In Colgrove v. Green, 328 U.S. 549, 556, Mr. Justice Frankfurter warned against courts entering the "political thicket". But the widespread, gross inequalities between the weight of one person's vote in different parts of the same State, in both Congressional elections and the election of State legislators, has made judicial intervention a necessity. Appellants have no quarrel with the philosophy of Baker v. Carr, 369 U.S. 186; Wesberry v. Sanders,

3. (contd.)
questions raised by the appeal, if any, are not published.

376 U.S. 1; and Reynolds v. Sims, 377 U.S. 533. Appellants would not suggest that the United judiciary recede to the cloistered safety of Colgrove v. Green, but do suggest that its "political thicket" caveat (repeated by Mr. Justice Frankfurter in his dissent in Baker v. Carr, 369 U.S. at 266) should not - and in fact cannot - be forgotten. When a Court is forced to provide a remedy because the legislature has failed to apportion legislators or to district Congressmen, the Court should go no farther into the thicket than necessary to remedy the constitutionally condemned evil. If the Court assumes to correct more than the Constitution condemns, and to substitute its political judgment of what ought to be the law for the Legislature's judgment, the Court presumes to act as a legislature, rather that as a court, and can expect the same

political criticism commonly heaped on legislatures for their political decisions. The court which does so has "enter[ed] upon policy determinations for which judicially manageable stands are lacking."[4/]

A reading of the few reported District Court cases[5/] in which Congressional Districts have been drawn indicates that those court have been quite circumspect in avoiding any usurpation of legislative power and have thereby,

---

4. Baker v. Carr, 369 U.S. 186, 226.

---

5. Roberts v. Babcock, 246 F.Supp. 396 (D. Mont. 1965).
Maryland Cit. Comm., etc. v. Tawes, 253 F.Supp. 731 (D. Md. 1966) affirmed sub nom. Alton v. Tawes, 384 U.S. 315.
People v. Kerner, 33 Ill. 2d 460, 211 N.E. 2d 736 (1965) U.S. Dist. Ct. participated.
Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz.) (1966)
Baker v. Ellington, 273 F.Supp. 174 (M.D. Tenn., 1967).

---

presumably, held political criticism to a minimum.[6] A few have even refused to draw districts on the ground that no legislative authority had made Congressional districts a requirement in the State involved.[7]

While disagreeing with the District Court majority's usurpation of legislative power

---

6. None of the opinions in these cases expressly professes to have found (or to have followed) guidelines in the comments on remedial devices in section X of this Court's opinion in Reynolds v. Sims, 377 U.S. 533, 585, but all were undoubtedly aware of Mr. Justice Stewart's statement in his concurring opinion (377 U.S. at 588) that: "I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as closely as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment."

7. Park v. Faubus, 238 F.Supp. 62 (E.D.Ark. 1965).
Calkins v. Hare, 228 F.Supp. 824 (E.D. Mich. 1964).

and deep penetration of the political thicket, appellants do, however, agree with that part of the majority opinion and judgment which holds that section 1 of the 1965 Congressional Districting Act is still in full force and effect and requires the election of Congressmen to be from districts. The logic or reasoning on which that holding is based is not stated in the opinion. Obviously, however, since the earlier declaration of unconstitutionality of the 1965 Act was based solely on excessive population variances between districts, and section 1 defines no districts, there is no reason for holding it unconstitutional. If that be the Court's reasoning, then it must follow that districts (if any) in which the population variance from ideal is not excessive are not unconstitutional. (And, further, the unconstitutional districts are unconstitutional only to the extent of their

variance from as nearly ideal as is practicable.) And, indeed, the majority opinion states (on page 20 of Appendix B): "Chapter 205 of the 1965 Act[s] of the Indiana General Assembly created only two (2) of the eleven (11) districts within tolerable limits of population."

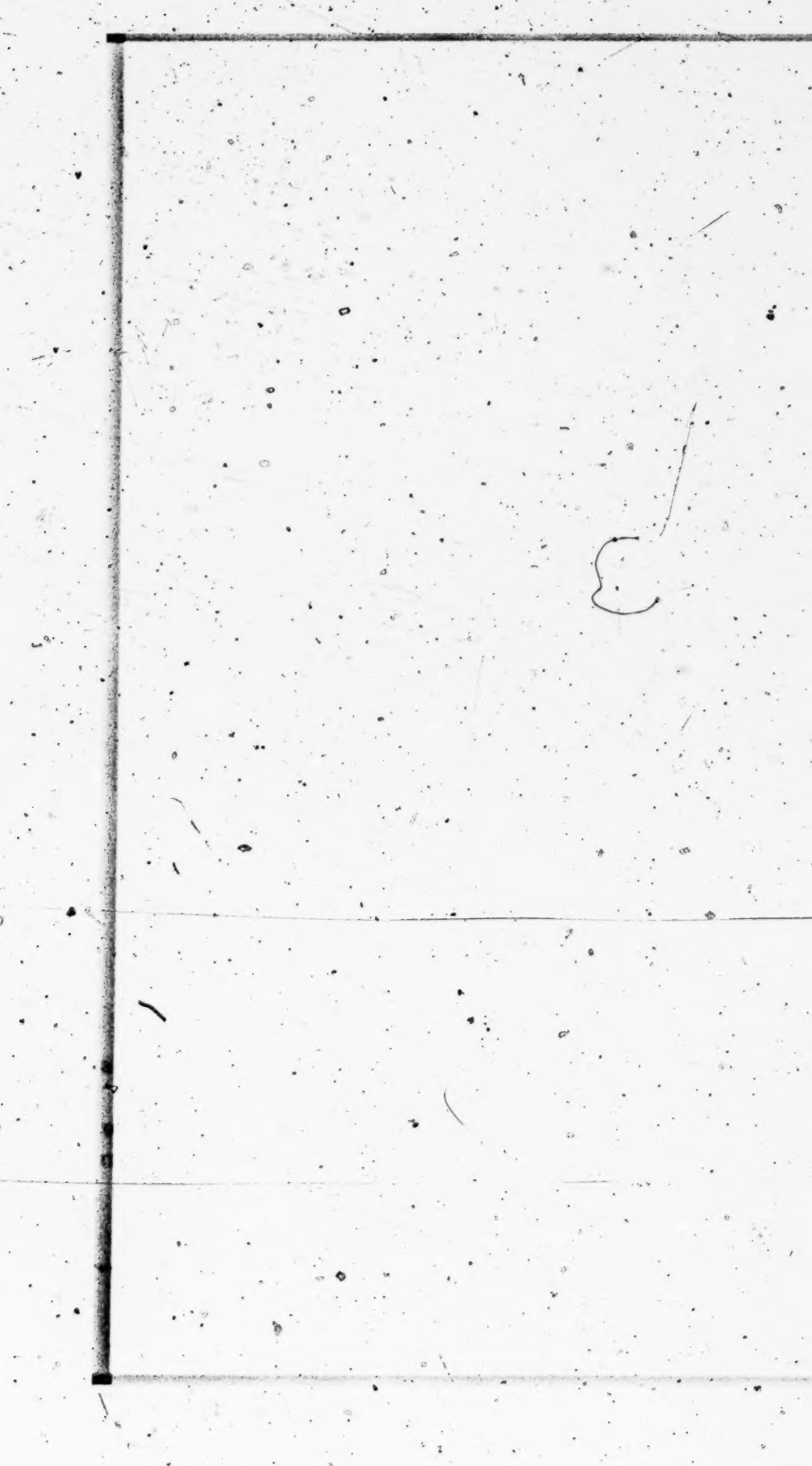
Those two districts would be the fifth and the ninth, inasmuch as they have the two lowest variances.[8/] By the majority's population standards these two districts are constitutional and if, as the decisions of this Court indicate to appellants, attainment of the one-person-one-vote ideal (as nearly as is practicable) is the only constitutional

8. The fifth is over-populated by 2,247 persons, or 0.5% of an ideal district, while the ninth is over-populated by 1,070 persons or 0.3%. These variances are much less than the maximum variances of the Court plan.

requirement, these two districts are constitutional and should have been left as they were. The majority of the Court, however, far from leaving them as they were, made extensive changes in both.

The only reason given for adding Floyd County's 51,397 population to the already slightly over-populated ninth district is found on page 20 of the majority opinion in Appendix B, in the statement that: "The 1965 Act divided the homogeneous counties of Floyd and Clark and placed them in two separate districts. . . ."[9] and despite all the homage

9. The same paragraph discloses the majority considered them homogeneous because they are one of nine Metropolitan Statistical Areas created in Indiana by the United States Census Bureau. It can be demonstrated that no change in the ninth district was made necessary by reason of necessary population adjustments in other districts, even under the majority's self-imposed policies.



paid to "traditional districts," no explanation is given why Clark County was not returned to the eighth district, where both it and Floyd were by the 1941 Act[10] and where also is, and was, the Vanderburgh County Metropolitan Statistical Area, the ninth district being otherwise without any part of a Census Bureau designated metropolitan area.

If a Republican dominated Legislature had made such unnecessary shifts of counties to and from the ninth district no self-serving declaration of eschewal of unnecessary violence to the heart of traditional districts, county lines and township lines and adherence to the homogeneous influence of metropolitan centers of population as the heart of any plan of

10. Prior to 1941 Indiana had twelve districts.

districting, would save it from the charge that Floyd County was shifted to the already Democratic ninth district to avoid the possibility that its traditional Democratic majority would swing the eighth to the Democratic candidate in a close or Democratic year. Yet such unnecessary changes would be the legislative prerogative of the General Assembly, so long as population equality was also achieved, as nearly as is practicable. The District Court's majority, in usurping the legislative prerogative of exercising political judgments unnecessary to a judicial remedy for the unconstitutionality of the 1965 Act, has invited (even if inadvertently) public criticism that its decision had a partisan motivation.

No specific reason is given for the many changes in the nearly perfect fifth

district,[11] including the shift of the incumbent Democrat's home county of Huntington to the highly Republican fourth district. While Huntington County's addition to the fourth district gives the fourth an eye-catching rectangular appearance and, with other changes, results in the fourth being the most nearly perfect population-wise of the majority plan's eleven districts, its removal from the fifth, along with the other changes, increased the fifth's 1965 over-population of only 2,247 (0.5%) to 4,098 (0.96%). Judge Holder's prior criticism of the 1965 Act[12]

11. Five of its nine counties were shifted from it and eight new counties were added.

12. In his dissent in Grills, et al. v. Branigin, et al., 255 F. Supp. 155, at 160, Judge Holder cites as an example of "gerrymandering" in the 1965 Act, this example: "One sees that two minority Congressmen are placed in completely new districts with only their home county retained from the old district in which the people had repetitively chosen them as their congressmen."

for putting two incumbent Congressmen in the tenth district would seem to be even more valid as a criticism of the majority plan, the difference being the Legislature's prerogative to make such political judgments. The majority, however, sees no evil in the similar result they have achieved in that it is declared to have been the unplanned result of adhering to standards of compactness, etc. The full statement of the majority, as found at page 27 of Appendix B, is particularly interesting in its oblique denial that the majority had entered the political thicket because, among other things, they chose "to adhere to the traditional heart of the districting plan of Indiana insofar as is reasonable" in preference to the 1965 pattern:[13]/

13. Overlooked is the fact that the majority changed the 1941 Act's fifth district (the "traditional district") more than did the 1965 Act, in that the majority added five

"We cannot agree with our colleague in dissent in his attempted adherence to the 1965 pattern of districts. The majority chooses to adhere to the traditional heart of the districting pattern of Indiana insofar as it is reasonable and effect practical homogeneous compactness and as related to the Metropolitan Statistical Areas of the 1960 Census. Any other consideration includes the forbidden factor of entering the political thicket of which Justice Frankfurter warned in the case of Colegrove v. Green, 66 S. Ct. 1198, 328 U.S. 549, 90 L. Ed. 1432 (1946). Unlike the unconstitutional apportionment of the 1965

---

13. (contd.)
counties (totaling 142,497 people) and subtracted three (totaling 182,205) while the 1965 Act added three fewer counties (totaling 96,634 less people moved) but subtracted the same number of counties, which, however, moved 102,979 less people. The majority may have achieved a slightly more compact fifth district but not a more traditional one and not a more nearly perfect district population-wise. Instead, the fifth's overpopulation has been almost doubled, increasing its percentage of variance from one-half of one percent to almost one percent. And with the additional "unplanned" result of

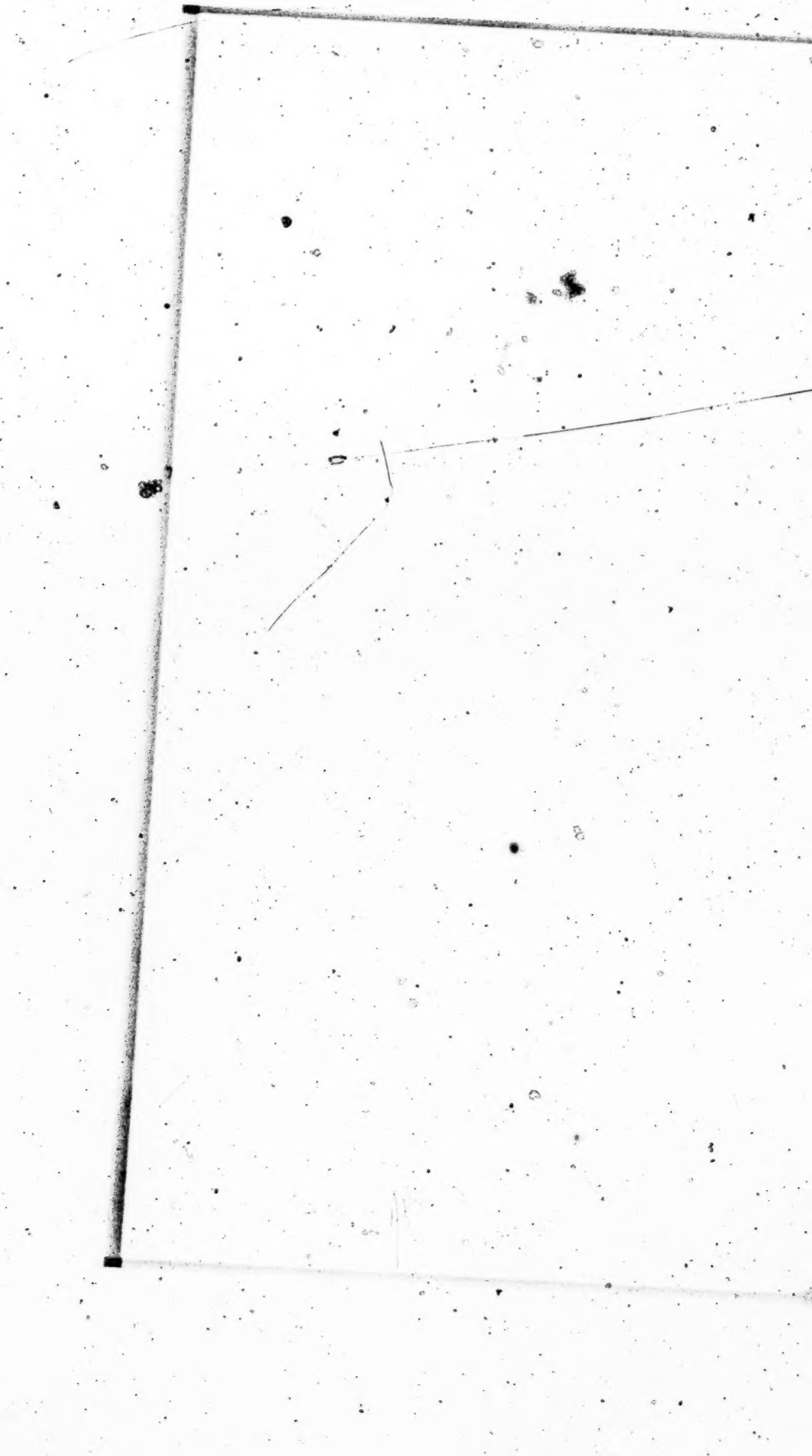
> Act of the Indiana General Assembly, the majority's apportionment does not pit an incumbent congressman against another of the same political party and does not indulge in grotesque geographical alignment of counties to accomplish such a result. The unplanned results of the majority's districts which adhere to Indiana's historical patterns, tolerable population variances and compactness of a judicial apportionment has resulted in the avoidance of such interference in that no incumbent congressman is pitted against another of the same political party and in one (1) instance is an incumbent congressman of one (1) party pitted against another of the opposite party. The majority believes Indiana will be best served with the compactness of the districts created."

That one bit of the debate between the District Court's judges concerning the proper judicial approach to providing a remedy in cases of this kind (of which there are certain to be

---

13. (contd.)
removing the incumbent's home county which had been there for over a quarter-century, at least.

many more in the near future) would seem to counsel to make it clear beyond doubt that this appeal presents a substantial question which urgently requires an answer by this Court. If the minds of counsel read more into that quotation than would the more detached mind, certainly the whole of the two opinions read together make the point. Whether the majority judges are right, whether the dissenting judge is right, or whether both are wrong, the District Courts are in great need of the Supreme Court's views and the people of Indiana are in need of a judicial remedy in which they can have the confidence and respect ordinarily accorded to judicial decisions, free of the doubts and frustrations with which they often react to partisan legislative enactments, even when passed by representatives they have elected.

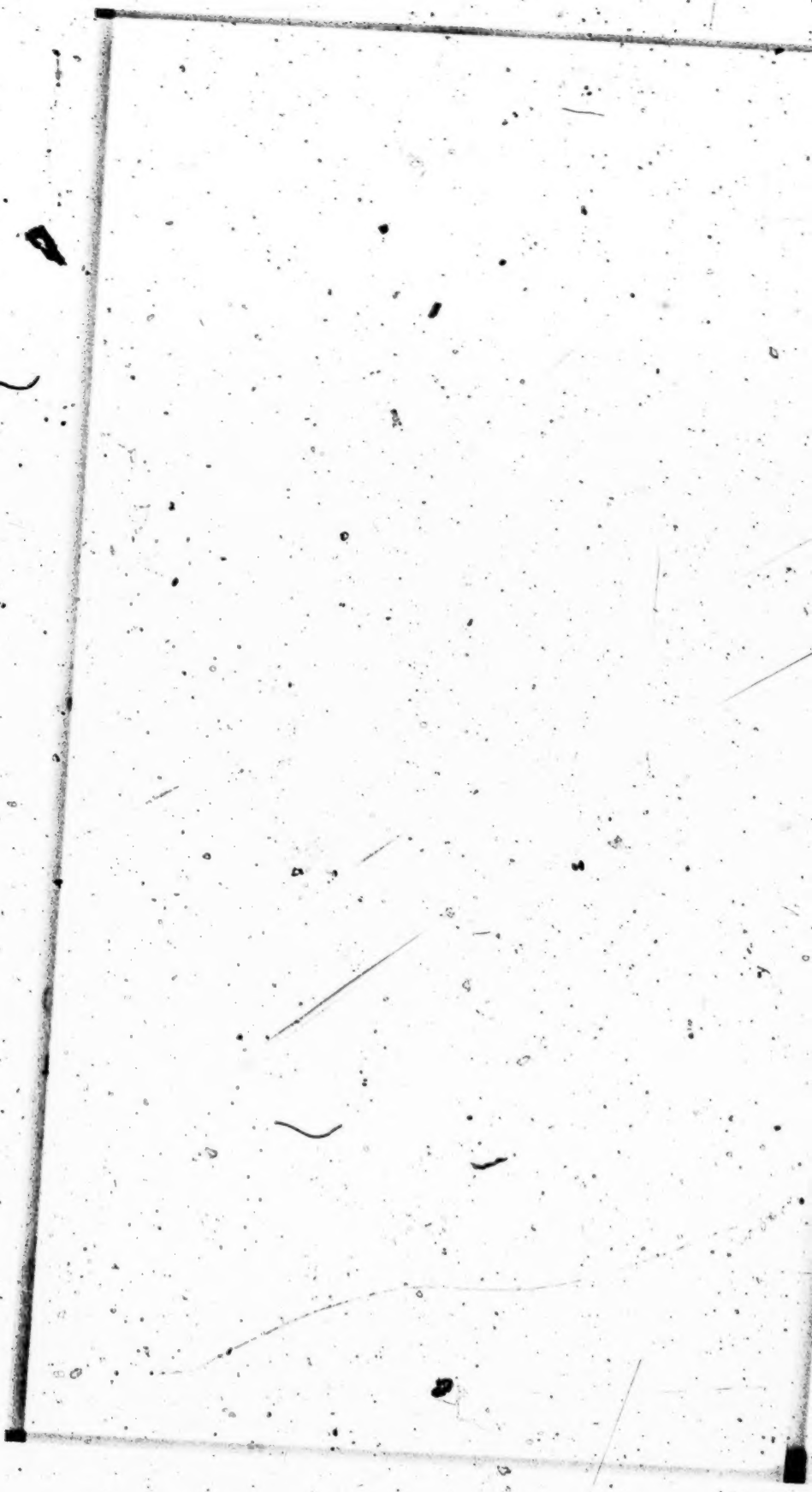


The question of how nearly equal in population judicially imposed Congressional districts must be may seem, on first blush, to be without great substance when the majority plan's population variance between its largest and smallest districts is only 2.6% of an ideal district (and the dissenting Judge's plan is 0.05%). However, the basic disagreements between the majority and their dissenting colleague which lead to this percentage differential are much greater than the differential itself.

If the same plan the majority has ordered had been enacted by the Indiana General Assembly, and the same plan the dissenting Judge has posed had been introduced and rejected by that legislature, appellants (as the defendant members of the State Election Board

face of a demonstrated possible plan with lower variances. And more concretely, whether the District Court, to justify the higher variances in its plan, can impose on itself standards of compactness, integrity of county and township boundaries, and non-division of United States Census Metropolitan Statistical Areas;[14] standards which neither the Constitution, nor any act of Congress, nor any act of the Indiana General Assembly has imposed. In other words, are District Courts which draw Congressional districts subject to the same rules as to

14. The majority's proclaimed, but undemonstrated adherence "to the traditional heart of the districting plan of Indiana insofar as . . . is reasonable" (Appendix B, p. 27) appears to be offered not as a justification for population variances, but as a political judgment that these traditional hearts of districts are preferable to the hearts of the 1965 districts because the latter are not sacrosanct nor steeped in tradition. (Appendix B, p. 27.)



population equality as are State Legislatures and, if so, has the majority of the District Court followed those rules or has it violated them?

Next to the question of whether the District Court can legislate an entirely new plan or may only correct the unconstitutional population variances in the State Legislature's plan, the most basic disagreement between the majority Judges and the dissenting Judge is over the size of the building blocks the District Court may, or should, use in building new, or correcting old, districts. And about that question, the parties who are now appellees, had this to say in their jurisdictional statement when they were appellants:

> "The United States Census of 1960 shows the population of Indiana by counties, or by cities, towns, townships, and even plat areas within major urbanized areas.

"Thus it was practical to use county, township, town or city boundary lines and rivers or other geographical or natural boundaries in defining the Congressional Districts to the end that each of the districts would have been substantially equal in population. This was not done.

"The Evidence showed that town, city, township and ward boundary lines had been used in the past by the Indiana General Assembly in defining Congressional Districts.

"In Indiana Acts 1931, Chapter 113, Section 14, Page 449, the Twelfth Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as Township lines.

"In Indiana Acts 1935, Chapter 1, Page 1256, the Eleventh Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as White River, incorporated towns of Woodruff Place and Beech Grove, Township and County boundary lines.

"In Indiana Acts 1965, Chapter 205, the Act before this

Court, the legislature used township boundary lines to define the 1st, 2nd, 6th, 10th and 11th Congressional Districts, thus recognizing the fact that it is entirely proper to use township lines as boundaries of Congressional Districts rather than county lines.

"The evidence showed that by using Township and Municipal lines as boundaries, the variances from the ideal District can be reduced to an average variance of approximately 1%, in lieu of the present 12.8% in one District as established by the 1965 Indiana General Assembly. This was pointed out by the minority opinion of the Court:

" 'The unquestioned facts before this Court are that Indiana and its legislature could and should have reapportioned Indiana by one of countless combinations by realigning of Counties in groupings and/or townships in groupings. Any one of such combinations would have been constitutional and in accord with the teachings of the Supreme Court.' (Emphasis added.)

"The failure of the 1965 General Assembly of the State of Indiana to

use available practicable means and methods in reapportioning the Congressional Districts is the basic issue presented by this appeal. The undisputed evidence was that the 1965 General Assembly could have followed one of many practicable methods of districting the State and dividing the population among the districts, any one of which would have resulted in substantially more equal voting power of the voters within the districts than the approximate 20% variation between one District (the 7th District) and another (the 1st District) established by the 1965 Indiana Act.

* * *

"As was observed in Reynolds v. Sims (1964), 377 U.S. 533, at Page 578, (supra), Congressional districts must fit into tighter limits of tolerance than do State reapportionment plans:

> " 'Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in Congressional districting. . . .'

"In preserving the weight equality of each citizen's vote the

State of Indiana could and should have used available Township, City, and Town boundaries. As was observed in Reynolds v. Sims (supra), 377 U.S. 533, at page 575,

> " 'Political subdivisions of States--Counties, Cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of State governmental functions.' "

While it may or may not be claiming too much to contend that the foregoing quotation has become the law of this case, its logic is persuasive to say the least. But, more to the point, if it is not the law of the case, it reveals a need for direction to District Courts, State Legislatures, and to their advisers on how small the building blocks must be with which the boundaries between Congressional districts

are drawn, when the use of blocks smaller than those used would have reduced a variance of 2.6% of ideal between the largest and smallest district to .005% of an ideal district.

Appellants, in stressing the need for guidance and directions, are not asking this Court to note jurisdiction for the purpose of rendering an advisory opinion. The questions posed by this appeal are very real and very vital questions on the answers to which affirmance or reversal of the District Court's judgment turns. And that judgment is the very antithesis of an advisory opinion. Rather, the need for directions and guidelines is stressed as an argument that the questions presented are substantial because the answers will affect more than the outcome of this case and may affect the voting rights of citizens in many States in the course

of the next few years. 15/

## CONCLUSION

This Supreme Court has and should exercise jurisdiction in this case to reverse a judgment of a District Court which goes beyond providing a necessary judicial remedy and legislates public policy and decides political questions for the State of Indiana and imposes on the State of Indiana eleven Congressional districts which are not as nearly equal in-

15. While appellants believe this appeal can be decided in time for this Court's decision to govern the 1968 election of Congressmen in Indiana, a later decision will not, however, be moot. There is no assurance that the General Assembly to be elected in 1968 (approximately one-half of the Senate will be hold-overs) will be able to agree on a constitutional redistricting Act. Therefore, the majority plan, if not voided by this Court, may govern not only the 1968 election, but also the 1970 election.

population as is practicable. Furthermore, the Court should exercise its jurisdiction to reverse a judgment of a district court which imposes on the State of Indiana court-drawn districts which are not as nearly equal in population as is practicable.

Respectfully submitted,

JOHN J. DILLON
Attorney General of Indiana

Charles S. White
Chief Counsel - Staff

Attorneys for Appellants

219 State House
Indianapolis, Indiana 46204

Phone: 317/633-5512

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| NELSON G. GRILLS,<br>Plaintiff, | ) | |
| DOROTHY C. DUDDLESTON,<br>JOHN P. GALLAGHER,<br>MILES H. MARSHALL,<br>LOUIS Y. MUNDY,<br>Intervening Plaintiffs, | ) | |
| -v- | ) | NO.<br>IP 64-C 101 |
| ROGER D. BRANIGIN,<br>EDWIN M. S. STEERS,<br>THURMAN M. DeMOSS,<br>As Members of the State<br>Election Board of Indiana,<br>Defendants. | ) | |

OPINION ON REMAND

The previous history of the above entitled action in this Court is set out in the opinion of the Court filed February 17, 1966, reported as Grills v. Branigin, 255 F. Supp. 155. Such previous opinion held, Judge Holder dissenting, that Chapter 205 of the Acts of 1965,

enacted by the General Assembly of Indiana and reapportioning Indiana's eleven congressional districts, was constitutional within the provisions of Article 1, § 2 of the Constitution of the United States.

The intervening plaintiffs, Dorothy C. Duddleston, et al, thereafter appealed such decision to the Supreme Court of the United States. On January 9, 1967, that Court announced its opinion, Duddleston et al v. Grills et al, 385 U.S. ___, 87 S.Ct. 611, vacating the judgment and remanding the case for further consideration in light of Swann v. Adams, 385 U.S. ____, 87 S.Ct. 569, decided the same day, Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L.Ed.2d 481, and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. No timely petition for rehearing was filed, and

the mandate of the Court has now been issued.

This Court, having given further consideration to the case in the light of such mandate and of the authorities cited therein, is now of the opinion and therefore finds that said Chapter 205 of the Acts of 1965 is unconstitutional and void by reason of excessive population variances between the congressional districts therein constituted.

A fortiorari the Court further finds that Chapter 174 of the Acts of 1941, enacted by the General Assembly of Indiana and being the congressional apportionment act in existence immediately prior to the enactment of said Chapter 205 of the Acts of 1965, is likewise unconstitutional and void.

The Court takes judicial notice of the fact that Thurman M. DeMoss has replaced

James E. Noland as a member of the State Election Board of Indiana, and that the said Thurman M. DeMoss, Roger D. Branigin and Edwin M. S. Steers now comprise the membership of such Board. The Court therefore, on its own motion, now substitutes the said Thurman M. DeMoss for the said James E. Noland as a party defendant herein.

The General Assembly of Indiana, now meeting in regular session, has adopted House Concurrent Resolution No. 6, and has caused a copy of the same to be forwarded to the Court in an informal manner. The resolution requests this Court to supply the General Assembly with "definitive guidelines by which said body can accurately interpret the intent of Article 1 Section 1 of the United States Constitution." We mention such resolution, despite the fact that it

is not and could not properly become a part of the record in this case, as a courtesy due the legislative branch of government of the State of Indiana. We are unable to comply with the resolution for the reason that the federal courts have consistently declined to give advisory opinions since the beginning of the Republic. Hayburn's Case, 1796, 2 Dall. 409, 1 L. Ed. 436.

The Court takes judicial notice of the fact that elections were conducted in November, 1966, in each of the eleven congressional districts established by Chapter 205 of the Acts of 1965, and that the congressmen elected at such election were duly seated and are now serving in the Congress of the United States. Nothing herein contained should be construed as casting any doubt upon the validity of their respective elections, nor upon their right to serve out the terms

for which they were elected.

In view of the findings herein made, it is considered and ordered that the defendants Roger D. Branigin, Edwin M. S. Steers and Thurman M. DeMoss, as members of the State Election Board of Indiana, and their successors in office, be and they are hereby restrained and enjoined from conducting any further elections pursuant to said Chapter 205 of the Acts of 1965, or Chapter 174 of the Acts of 1941, or any previous Act of the General Assembly of Indiana purporting to establish districts for the election of congressmen from such State.

The Court retains jurisdiction of this action for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the General Assembly

of the State of Indiana, if any, and for such other action in the premises as may be necessary.

Dated this 7th day of February, 1967.

/S Win G. Knoch
Win G. Knoch, Judge,
U. S. Circuit Court of
Appeals for the Seventh
Circuit, Designated Member
of the Three-Judge Trial
Court

/S Cale J. Holder
Cale J. Holder, Judge, U. S.
District Court, Designated
Member of the Three-Judge
Trial Court

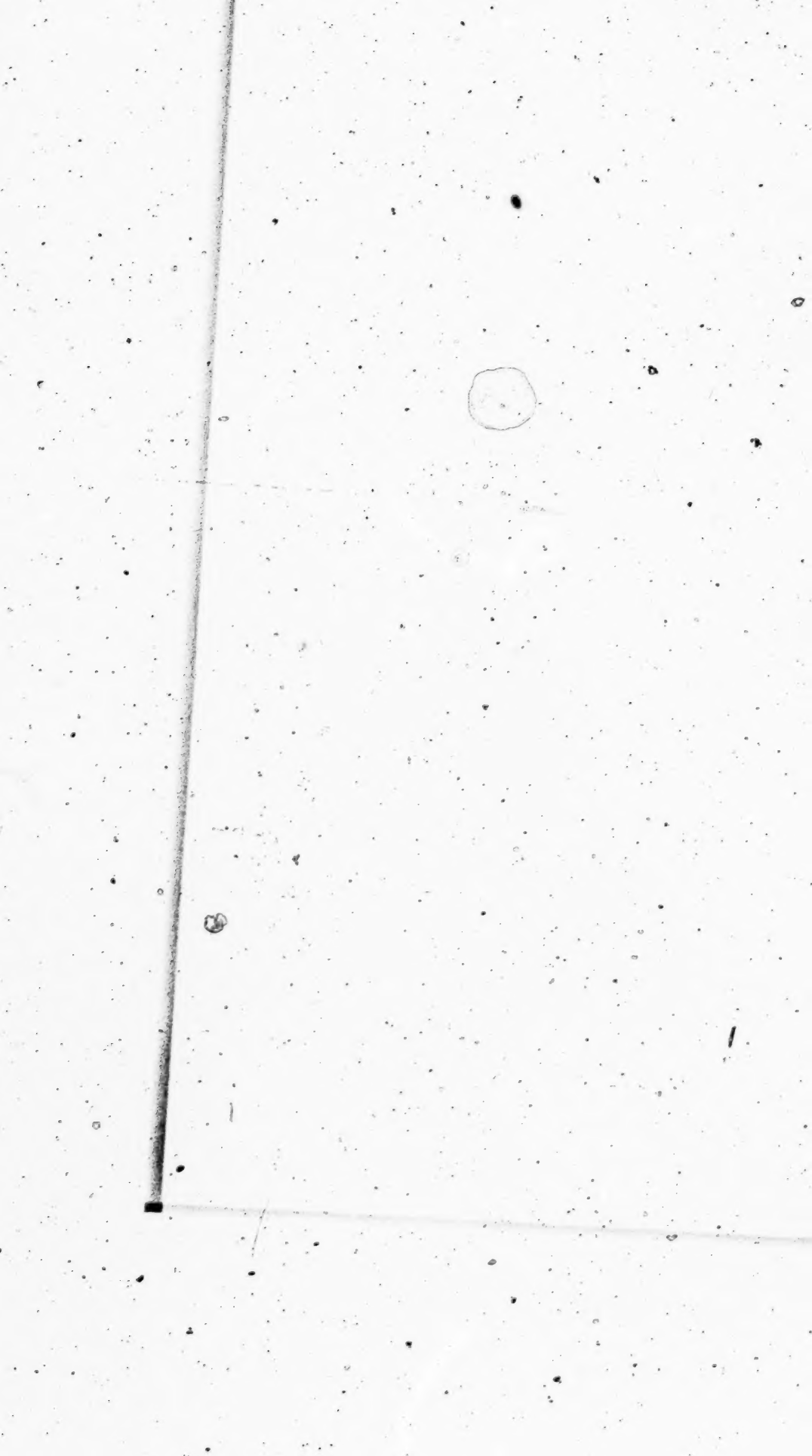
/S S. Hugh Dillin
S. Hugh Dillin, Judge, U. S.
District Court, Assigned
Trial Judge, and Member of
the Three-Judge Trial Court

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| NELSON G. GRILLS, Plaintiff, | ) | |
| DOROTHY C. DUDDLESTON, | ) | |
| JOHN P. GALLAGHER, | ) | |
| MILES H. MARSHALL, | ) | |
| LOUIS Y. MUNDY, | ) | |
| JOSEPH W. SUMMERS, Intervening Plaintiffs, | ) | |
| | ) | NO. |
| vs. | ) | IP. 64-C-101 |
| | ) | |
| ROGER D. BRANIGIN, | ) | |
| EDWIN M. S. STEERS, | ) | |
| THURMAN M. DeMOSS, | ) | |
| As Members of the State Election Board of Indiana, Defendants, | ) | |
| UNITED STATES OF AMERICA, Intervenor. | ) | |

This action was commenced March 2, 1964 by Nelson G. Grills contesting the constitutionality of the congressional apportionment in Indiana by the Indiana General Assembly. The statute challenged was Chapter 174 of the 1941 Acts of the Indiana General Assembly.



The second phase of the action commenced with the enactment into law of Chapter 205 of the 1965 Acts of the Indiana General Assembly pending Mr. Grills' action. Chapter 205 created new congressional districts. Thereafter, the intervening petitioners entered the pending action and challenged the constitutionality of the new law. This Court adjudged the intervening petitioners were wrong and upheld the constitutionality of the law. Grills v. Branigin, 255 F. Supp. 155. This ruling was vacated by this Court after the United States Supreme Court on January 9, 1967 remanded the case to this Court for further consideration upon the intervening petitioners appealing this Court's ruling. Duddleston et al. v. Grills et al., 385 U.S. _____, 87 S. Ct. 611.

This Court in February of 1967 entered its judgment. Chapter 205 of the 1965 Acts of the Indiana General Assembly was held

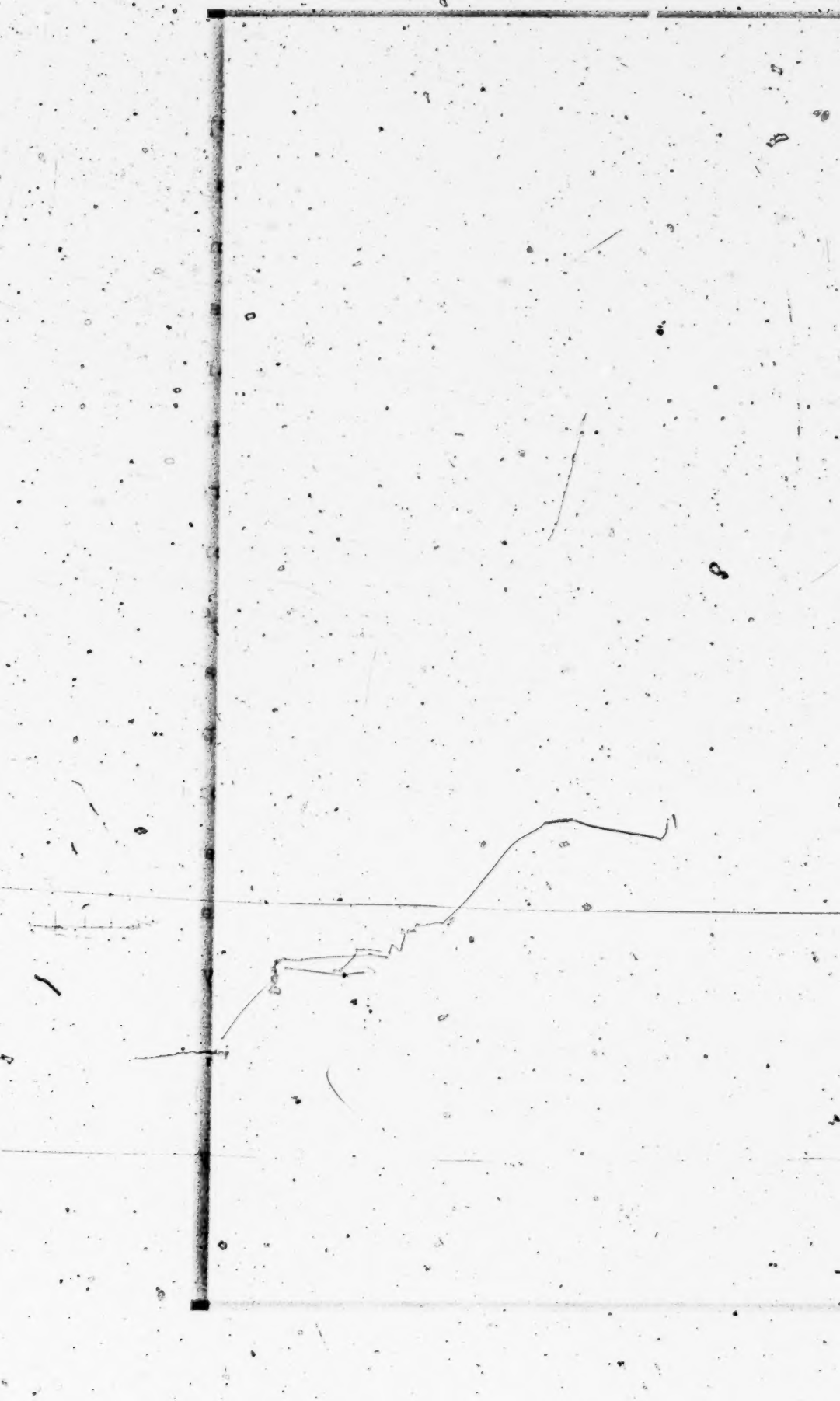
unconstitutional and void by reason of excessive population variances between the congressional districts therein constituted. Chapter 174 of the 1941 Acts of the Indiana General Assembly was also found unconstitutional and void. The defendants and their successors in office were enjoined from conducting elections pursuant to the voided Acts, or any previous Act of the Indiana General Assembly purporting to establish congressional districts for Indiana. The Court retained jurisdiction of the action for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the Indiana General Assembly, if any, and for such other action in the premises as may be necessary.

The Indiana General Assembly was in its regular session at the time of this judgment. It adjourned sine die and no congressional

districting law was enacted although bills were offered, considered and failed to pass. That since the adjournment there has been no further session of said Assembly, nor has the Governor of Indiana issued any call for any special session of said Assembly, nor does he at this time intend to issue any call for any special session. It is highly improbable that said Assembly, if called into session, could agree on any constitutional plan for dividing the State of Indiana into congressional districts. There are vacancies by reason of death and resignation of members of the said Assembly and the Governor of Indiana has not issued writs of election to fill vacancies as provided by Article 5, Section 19 of the Indiana Constitution. If a special session was called, the counties and citizens of these counties in this class action would be unprecedented in the said Assembly session in the creation

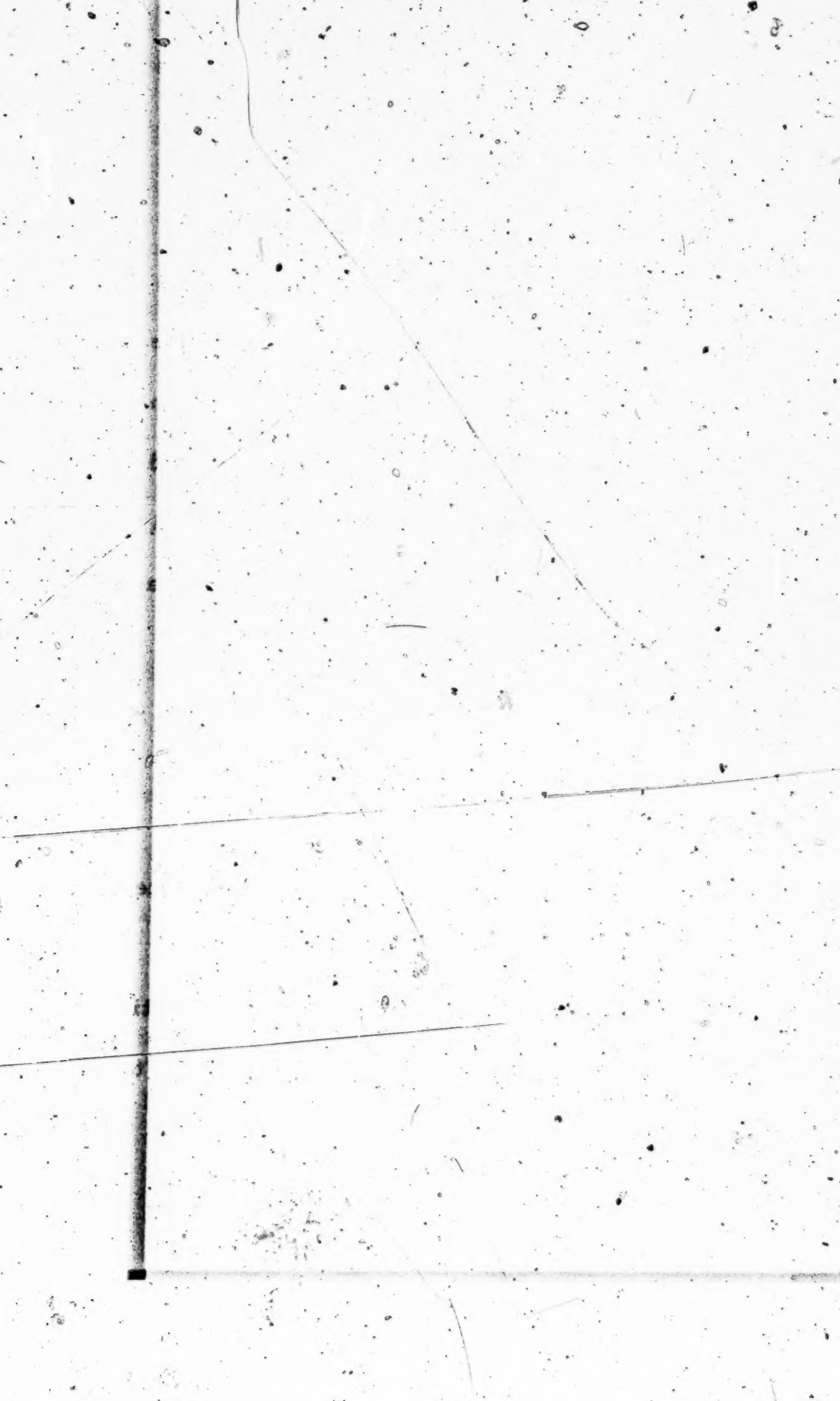
of congressional districts. Without such representation, their right to petition the said Assembly in session under the Indiana Constitution is impaired and less effective than the citizens of other counties with representation in the said Assembly. It appears impossible for the State of Indiana to enact constitutional legislation creating congressional districts in time for the general election of 1968. The time table under the election laws of Indiana for the declaration of candidacy for the nomination for the office of Representative for Congress by districts provides for the filing on February 27, 1968 and within the succeeding thirty (30) days in order for such candidate to be voted upon in the primary on May 7, 1968.

This Court's Judgment of February 1967 enjoined the defendants from conducting any



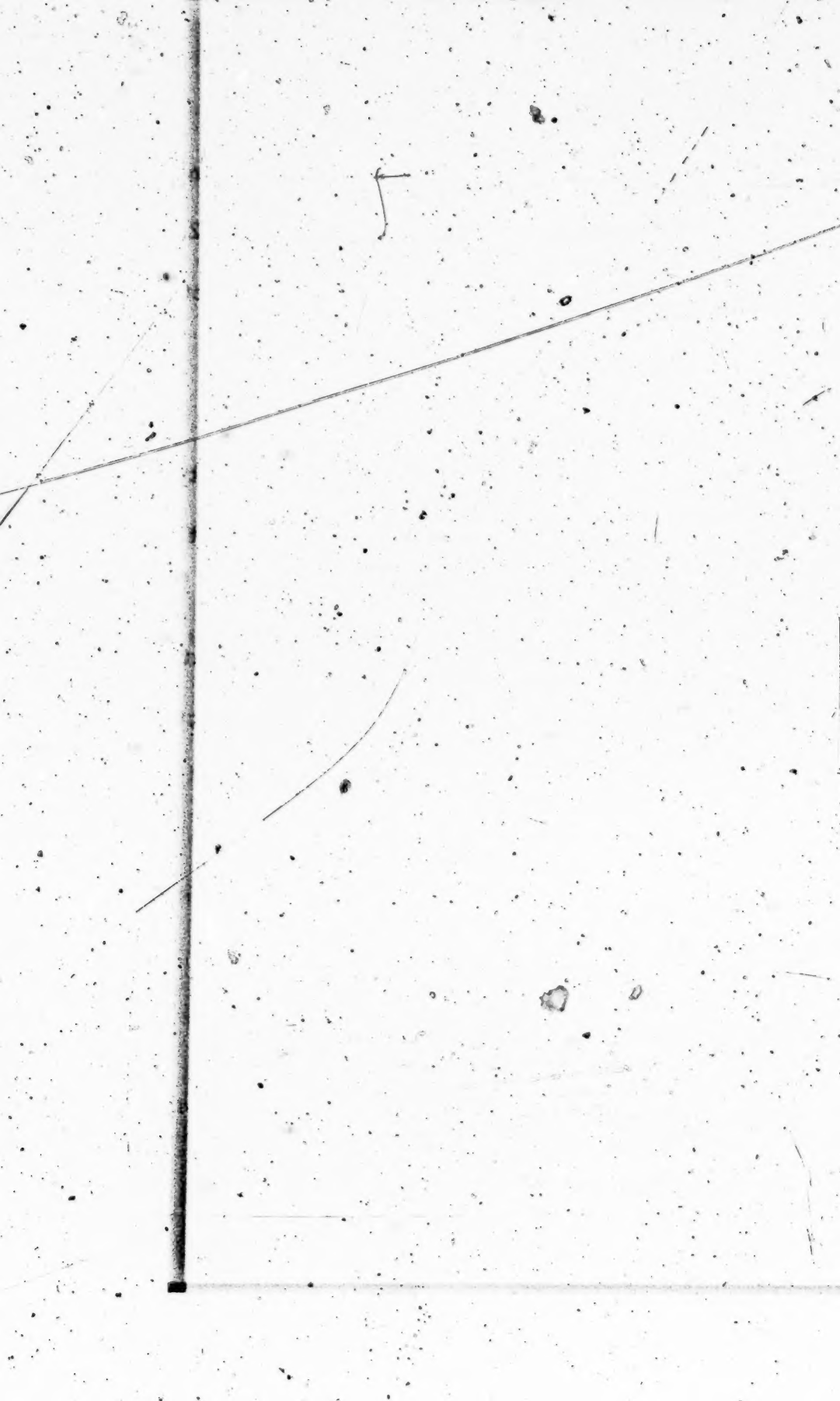
further elections pursuant to Chapter 205 of the 1965 Acts of the Indiana General Assembly and under any prior congressional districting law, and the Court retained jurisdiction of the action for such other action in the premises as may be necessary. The retention of jurisdiction was in accordance with the requests of the plaintiff and original intervening plaintiffs that they be given all such other, further and different remedies as the Court may deem just and necessary in the premises.

The original intervening plaintiffs first noticed the Court of the impasse in the Indiana 1968 election on November 8, 1967 and requested this Court to apportion the congressional districts. Thereafter, they filed supplemental petitions to the same effect together with a motion to advance the cause. The original intervening

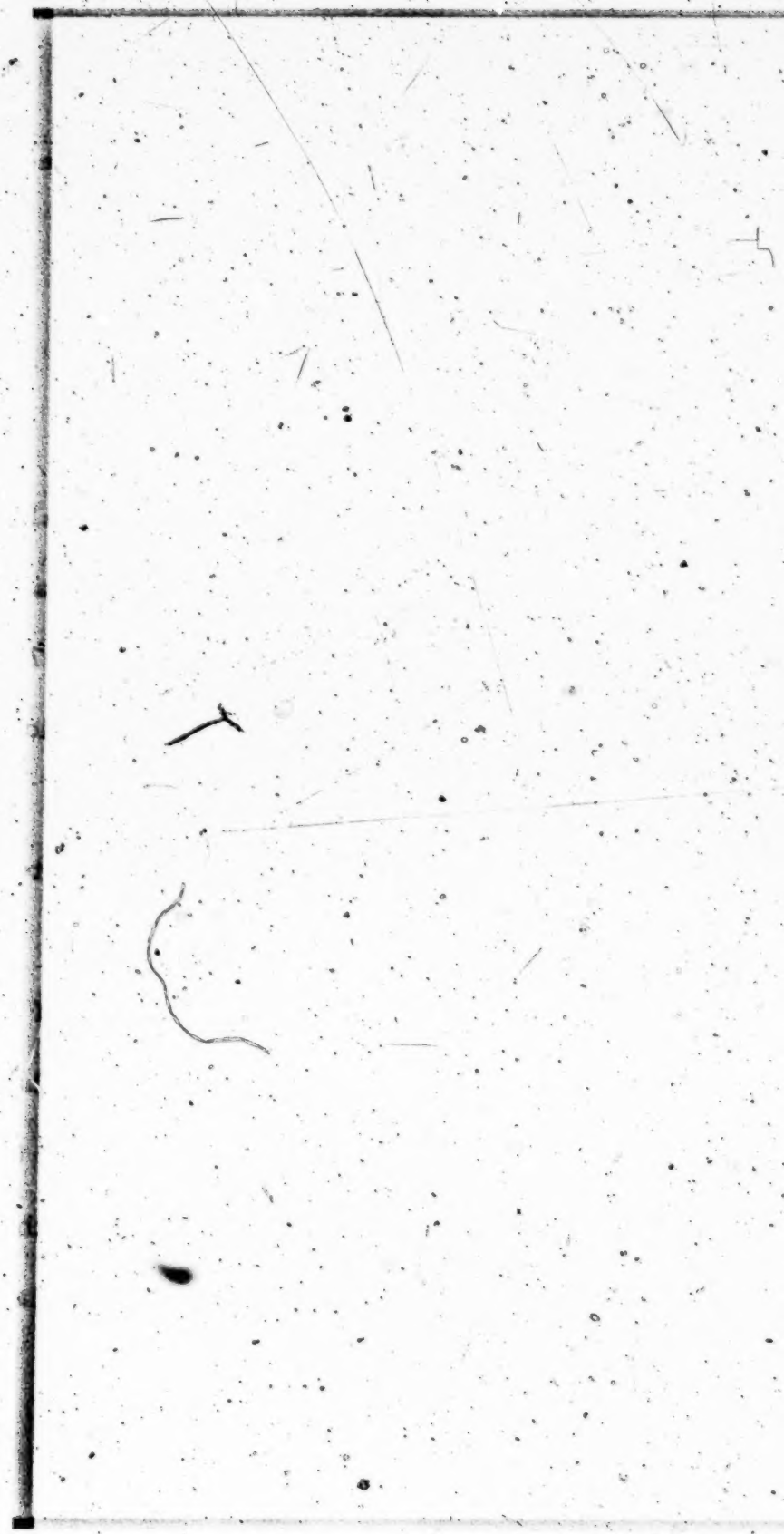


plaintiffs also requested that the December 14, 1967 Public Law 90-196 of the United States Congress (81 Stat. 581, 55 Stat. 761, 2 U.S.C.A. 2a) requiring Indiana to conduct elections by districts and not at large be declared unconstitutional which request is joined in by the original plaintiff. The defendants support the constitutionality of the law. The recent intervenor requests that the elections not be at large. The defendants merely seek instructions of the Court as to what modifications should be made to the void districts of Chapter 205 of the 1965 Acts of the Indiana General Assembly. The defendants do not ask this Court to apportion and do not allege they have the power to do so. The original plaintiff asks that the Court authorize the defendants to apportion Indiana.

Article I, Section 4, Clause 1 of the



United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly and the Election Board does not possess the legislative power under the Indiana Constitution nor does it possess judicial power under the Indiana Constitution. In the case of Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795, it was held that Article I, Section 4, Clause 1 of the United States Constitution's reference to the legislature of the several states required complete legislative treatment of a Districting Act which included the approval of the Governor. The legislature of Minnesota had passed a Districting Act which was vetoed by the Governor of that state and the districting of the state by that Act was held not to be in compliance



with the United States Constitution which specifically empowered the legislature to create districts.

It is unnecessary for the Court to reach the issue of constitutionality of Public Law 90-196 approved December 14, 1967 and the requested at large election as Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly is in force and effect and requires districting.

We find that the correct basis for the apportionment of the State of Indiana should be upon the United States Decennial Census of 1960 which is judicially noticed even though it may be a fact that the census is out dated and the communities of the state have grown disproportionately in population. The eleven (11) congressmen apportioned by Congress to the State

of Indiana is based on the census conducted by the United States and not upon any other governmental or private census and cannot be changed until the next United States Census. We think the Census of 1960 must be tolerated until the next official census in order to maintain relative political stability.

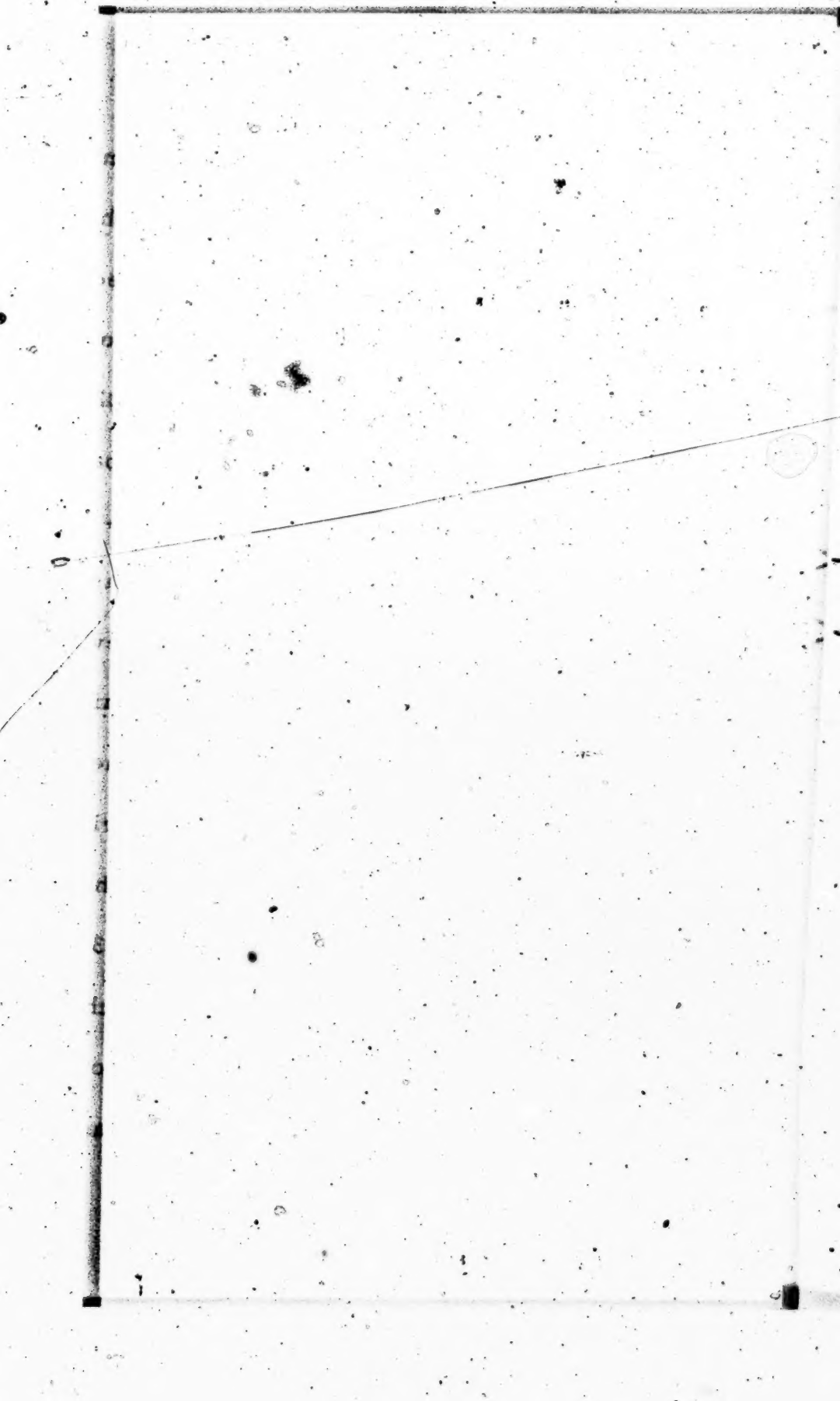
The citizens of Indiana are entitled to immediate relief, and we undertake in the order to follow the apportioning of the eleven (11) congressional districts geographically among the counties and township units of government in Indiana with a minimal variance in population between such districts. The variance is so minimal that it is not deemed practicable, necessary or advisable to sever the county units except in the metropolitan counties of Lake and Marion as each have more population than would to tolerated

in a district. The population of Indiana is 4,662,498 and perfect apportionment would require a district population of 423,863. The districts apportioned have the following population and variances:

| District | Population | Pop. Variance | Per Cent Variance |
|---|---|---|---|
| 1 | 427,267 | +3,404 | +.0080 |
| 2 | 423,227 | - 636 | -.0015 |
| 3 | 418,220 | -5,643 | -.0133 |
| 4 | 423,824 | - 39 | -.00009 |
| 5 | 419,765 | -4,098 | -.0096 |
| 6 | 428,197 | +4,334 | +.0102 |
| 7 | 426,620 | +2,757 | +.0065 |
| 8 | 424,760 | + 897 | +.0021 |
| 9 | 425,360 | +1,497 | +.0035 |
| 10 | 417,158 | -6,705 | -.0158 |
| 11 | 428,100 | +4,237 | +.0099 |

The population overages of the First and

Eleventh Districts total 7,641 and reduce the possibility of a perfect district for the other nine districts by 849 from 423,863 to 423,024. The gross percentage variance based on the perfect district of 423,863 population is computed from the Sixth and Tenth Districts for a total of .0260 per cent. The districts as created are compact and so far as possible follow traditional geographic and congressional districting. It was impossible to retain the composition of the previous districts intact because of the effect of the high variances from the perfect district upon other districts. For example, the Eleventh District was previously comprised of Center Township of Marion County which has a population of 333,351 and Wayne Township of Marion County which has a population of 99,722 for a total district population of 433,073, and an overage of +9,210 and



a percentage of +. 0217. The new Eleventh District retains Center Township, removes Wayne Township from the district and adds the less populated contiguous Townships of Lawrence and Warren in Marion County reducing the variance to +4, 237 for a percentage variance from a perfect district of +. 0099.

The Court having jurisdiction of the parties and subject matter of the action,

IT IS ORDERED, ADJUDGED AND DECREED that all members of the House of Representatives of the United States Congress from the State of Indiana hereafter to be nominated and elected under the election laws of the United States and of the State of Indiana, including any special election, shall be nominated and elected from districts in accordance with Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly. This Court's Judgment of February 9, 1967, declaring

a percentage of +.0217. The new Eleventh District retains Center Township, removes Wayne Township from the district and adds the less populated contiguous Townships of Lawrence and Warren in Marion County reducing the variance to +4,237 for a percentage variance from a perfect district of +.0099.

The Court having jurisdiction of the parties and subject matter of the action,

IT IS ORDERED, ADJUDGED AND DECREED that all members of the House of Representatives of the United States Congress from the State of Indiana hereafter to be nominated and elected under the election laws of the United States and of the State of Indiana, including any special election, shall be nominated and elected from districts in accordance with Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly. This Court's Judgment of February 9, 1967, declaring

Chapter 205 of the 1965 Acts of the Indiana General Assembly to be unconstitutional, was intended only to void Sections 2 through 13 of that Act and insofar as that Judgment of February 9, 1967 may be construed to void Section 1 of that Act it is hereby vacated and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the limits of each district and the territory included therein shall be as hereinafter provided until the Indiana General Assembly shall otherwise provide for districts:

First District. The Townships of Calumet, North and St. John, in the County of Lake, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the First Congressional District of the State of Indiana.

Second District. The Townships of Hobart, Ross, Hanover, Center, Winfield, West Creek, Cedar Creek and Eagle Creek, in the County of Lake, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 and the Counties of Porter, LaPorte, Starke, Newton, Jasper, Pulaski, White, Tippecanoe and Benton shall be and constitute the Second Congressional District of the State of Indiana.

Third District. The Counties of St. Joseph, Elkhart, Marshall and Kosciusko shall be and constitute the Third Congressional District of the State of Indiana.

Fourth District. The Counties of LaGrange, Steuben, Noble, DeKalb, Whitley, Allen, Adams, Wells and Huntington shall be and constitute the Fourth Congressional District of the State of Indiana.

Fifth District. The Counties of Fulton, Cass, Miami, Wabash, Howard, Grant, Blackford, Clinton, Tipton, Boone, Hamilton and Carroll shall be and constitute the Fifth Congressional District of the State of Indiana.

Sixth District. The Townships of Washington, Pike, Wayne, Decatur, Perry and Franklin, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965, and the Counties of Morgan, Johnson, Shelby, Rush and Hancock shall be and constitute the Sixth Congressional District of the State of Indiana.

Seventh District. The Counties of Warren, Fountain, Montgomery, Hendricks, Putnam, Parke, Vermillion, Vigo, Clay, Owen, Monroe, Greene, Sullivan, Martin and Brown shall be and

constitute the Seventh Congressional District of the State of Indiana.

Eighth District. The Counties of Knox, Daviess, Gibson, Posey, Vanderburgh, Warrick, Pike, Dubois, Spencer, Perry, Crawford, Orange and Harrison shall be and constitute the Eighth Congressional District of the State of Indiana.

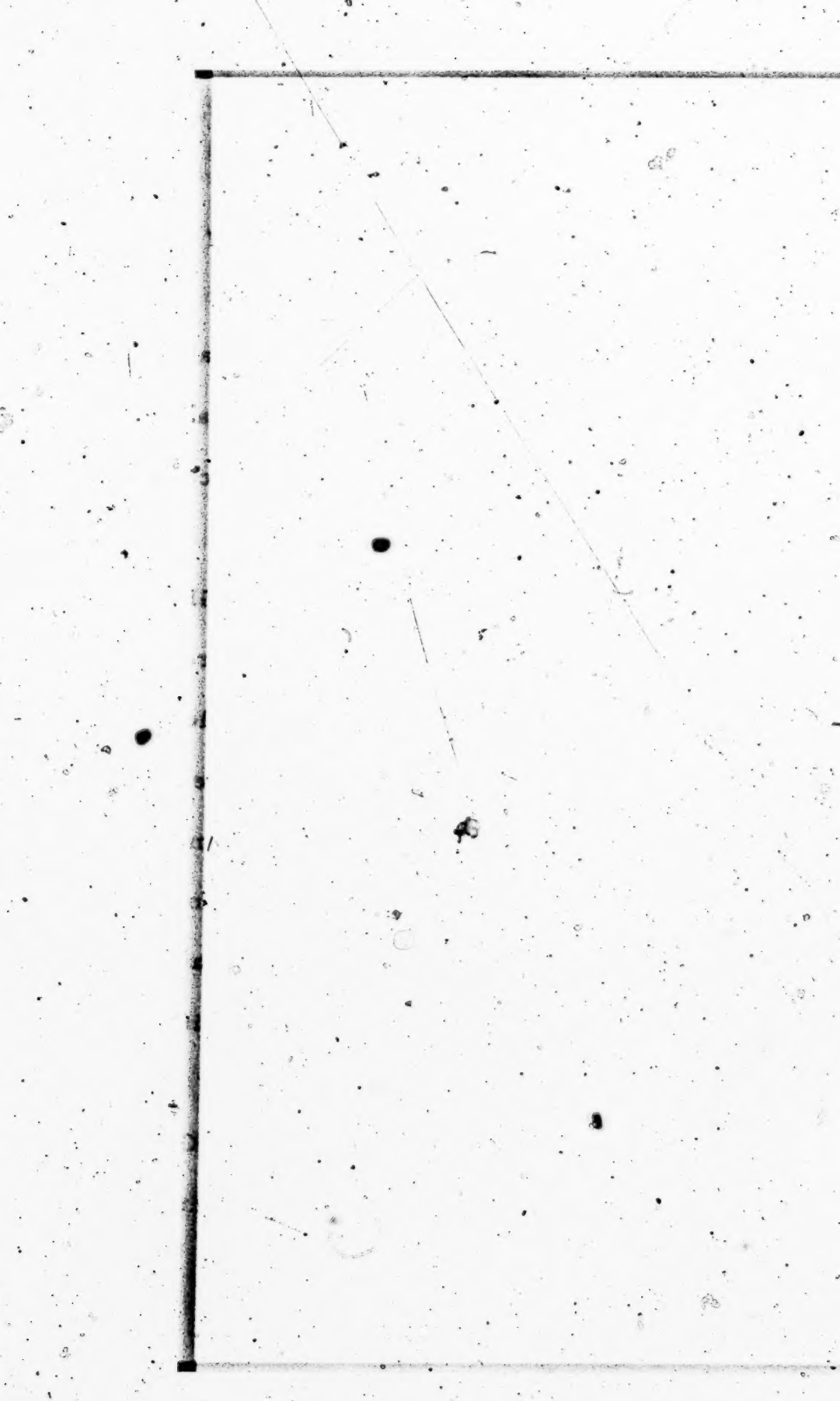
Ninth District. The Counties of Floyd, Clark, Washington, Lawrence, Jackson, Bartholomew, Jennings, Scott, Jefferson, Switzerland, Ohio, Dearborn, Ripley, Franklin, Fayette and Decatur shall be and constitute the Ninth Congressional District of the State of Indiana.

Tenth District. The Counties of Madison, Delaware, Randolph, Wayne, Henry, Jay and Union shall be and constitute the Tenth Congressional District of the State of Indiana.

Eleventh District. The Townships of Center, Warren and Lawrence, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the Eleventh Congressional District of the State of Indiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, the Secretary of State of the State of Indiana and all election officials of the State of Indiana under the Election Code of Indiana are mandated to conduct all primary, general and special elections for the office of Representative to the United States Congress in accordance with this judgment in the districts created by this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, the Secretary



of State of the State of Indiana and all election officials of the State of Indiana under the Election Code of Indiana be and they are hereby enjoined from conducting any primary, general and special elections for the office of Representative to the United States Congress by the use of districts other than those created by this judgment and by the use of an at large district.

The dissent of our colleague inadvertently would sacrifice factors of judicial apportionment and include factors prevalent in a legislative apportionment which include objective of retention or elimination of incumbent congressmen, splitting counties of one political hue or another, and other considerations inherent in the unconstitutional 1965 legislative apportionment which was accomplished by that Act.

The majority's apportioned districts

achieve the requirements of equality laid down in the Supreme Court Decisions without doing unnecessary violence to the heart of traditional districts, county lines and township lines, including the 1965 Act. Chapter 205 of the 1965 Act of the Indiana General Assembly created only two (2) of the eleven (11) districts within tolerable limits of population. The other nine (9) districts were grossly violative of the tolerable limits of population and necessitated changes. The 1965 Act made gross population shifts from the previous districts established in the 1941 session of the Indiana General Assembly. Some of the districts created by the 1965 Act were not compact. The 1965 Act divided the homogeneous Counties of Floyd and Clark and placed them into two (2) separate districts and the same occurred with respect to the Counties of

Elkhart and St. Joseph. A new legislature has been elected since the 1965 legislature and in their regular session they failed to agree that simple adjustments could be made to the districts created by the 1965 Act of the previous legislature. The present unconstitutional districts of 1965 are not sacrosanct, nor are they steeped in tradition. The United States Census of Population for 1960 presents the additional information that there are nine (9) Metropolitan Statistical Areas. They are the adjoining Counties of Clark and Floyd area, the Vanderburgh County area, Vigo County area, Marion County area, Delaware County area, Lake County area, Porter County area, St. Joseph County area, and the Fort Wayne County area. The Lake and Marion County areas respectively contain substantial population in excess of a would be

perfect district and must be and are divided. The practical effect of these metropolitan centers of population and their homogeneous influence is that they will be and are the heart of any plan of districting.

We have considered the many prior patterns of legislative districts in Indiana which were established in times when the General Assembly of Indiana was not faced with the fundamentals that are now factors of districting. The traditional heart of every district is retained by this Court's districts, however the accretions and separation of some counties from some districts is necessary to meet the present day factors. For example, the Third District as created by the 1941 Act of the Indiana General Assembly was composed of the Counties of LaPorte, St. Joseph, Elkhart and Marshall. In the 1965 session of the Indiana General Assembly, the Third

District was composed of the Counties of LaPorte, St. Joseph, Marshall and Starke with a total population based on the 1960 Census of 384,079 or 39,784 less population than a would be perfect district of 423,863 which was not tolerable. This Court's Third District uses the traditional three (3) Counties of St. Joseph, Elkhart and Marshall and adds the County of Kosciusko. Kosciusko County was a part of the Second District and of necessity had to be separated from the Second District with its accretion of Hobart Township in Lake County and such separation contributes to the compactness of both the Second and Third Districts as constituted by this Court.

The Court does not have the simple facts before it that were present in the case of Klahr v. Goddard, 250 F. Supp. 537 (D. C. Ariz. 1966).

constituted were within constitutionally tolerable population limits. (Districts Five and Nine). The other nine (9) were not within such limits, and, of course, could not all be adjacent to one another. Thus; the Court is faced with a far different problem than merely shifting one (1) county between two (2) adjacent districts. In addition, a new legislature was convened and refused to accept the pattern of the 1965 districting. The adjustments of the 1965 pattern of non-compact districts required the substantial deletion of population from the following districts:

| | |
|---|---|
| First District overage from perfect district of | +30,345 |
| Second District overage from perfect district of | + 7,201 |
| Fourth District overage from perfect district of | +27,074 |
| Sixth District overage from perfect district of | +15,098 |

Eighth District overage
from perfect district of +19,389

Eleventh District overage
from perfect district of +9,210

and the substantial addition of population to the following districts:

Third District underage
from perfect district of -39,784

Seventh District underage
from perfect district of -54,200

Tenth District underage
from perfect district of -17,645

The results of necessarily moving approximately 27,000 population out of the First District as established in 1965 to the Second District (and there was no other place they could go) with an overage of approximately 7000 population as established in 1965 makes the Second District with an overage of approximately 33,000 population and some population had to be removed therefrom to another. The

problem was multiplied nine (9) times as the above underages and overages of the 1965 districts disclose. The net result of developing the districts is similar to the example of the domino game when one (1) standing domino falls many more are affected by the tumbling domino. In addition counties are not composed of uniform population and vary greatly.

We cannot agree with out colleague in dissent in his attempted adherence to the 1965 pattern of districts. The majority chooses to adhere to the traditional heart of the districting pattern of Indiana insofar as it is reasonable and effect practical homogeneous compactness and as related to the Metropolitan Statistical Areas of the 1960 Census. Any other consideration includes the forbidden factor of entering the political thicket of which Justice Frankfurter

warned in the case of Colegrove v. Green, 66 S.Ct. 1198, 328 U.S. 549, 90 L.Ed. 1432 (1946). Unlike the unconstitutional apportionment of the 1965 Act of the Indiana General Assembly, the majority's apportionment does not pit an incumbent congressman against another of the same political party and does not indulge in grotesque geographical alignment of counties to accomplish such a result. The unplanned results of the majority's districts which adhere to Indiana's historical patterns, tolerable population variances and compactness of a judicial apportionment has resulted in the avoidance of such inference in that no incumbent congressman is pitted against another of the same political party and in only one (1) instance is an incumbent congressman of one (1) party pitted against another of the opposite party. The majority

believes Indiana will be best served with the compactness of the districts created.

The dissent's reference to the summary total of the relocated population of all of the eleven (11) districts of the majority's districting is eye catching but is not based upon any constitutional or legal principal anymore than the summary of the total variances of the eleven (11) districts from a perfect district would be. No legislative apportionment has been rendered unconstitutional by the addition of the variances of all districts in a state, nor by the relocation of population. The statistics of necessary population shifts are further exampled by the absolute necessity of moving the entire population of Hobart Township in Lake County (consisting of 39,223) out of the First District into the Second District as created by the 1965 Act of the Indiana General Assembly and moving the entire

population of St. John Township of Lake County (consisting of 12,282) out of the Second District into the First District for a total population change of 51,505 to rehabilitate the invalid apportioned First District. This overloaded the Second District by approximately 33,000 population (now we have approximately 84,505 relocations) and it was surrounded by the Third and Seventh Districts with substantial underages in population totaling 93,984; the Fourth District with an overage of 27,074; the Fifth District with an overage of 2,245; and the Sixth District with an overage of 15,098. What county or counties from the perimeter of the Second District containing 33,000 population can be moved to the Third or Seventh Districts? We found no such simple solution. Bordering these districts a similar problem existed. Another example is

the Eleventh District as created in 1965 with an overage in population of 9, 210 and to diminish this overage one of two (2) townships (Wayne containing 99, 722) of the two (2) township district had to be moved to another district. Hence the computation of relocated population is of no legal significance. The 1965 legislative apportionment was conceived in violation of the law, the districts were so grossly apportioned and so geographically grotesque, that the argument of relocation of population is laid upon an unsound base.

Dated this 14 day of February, 1968.

/S/ Win G. Knoch
Win G. Knoch, Judge, U. S. Circuit Court of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court

/S/ Cale J. Holder
Cale J. Holder, Judge, U. S. District Court, Designated Member of the Three-Judge Trial Court

[Irrelevant detail shown on the Court's map omitted from this copy.]

INDIANA 1960 CENSUS POPULATION 4,662,498
PERFECT APPORTIONED DISTRICT POP. 423,863

FIRST DISTRICT IS COMPOSED OF CALUMET TOWNSHIP, NORTH TOWNSHIP, ST. JOHN TOWNSHIP OF LAKE COUNTY.

ELEVENTH DISTRICT IS COMPOSED OF CENTER TOWNSHIP, WARREN TOWNSHIP, LAWRENCE TOWNSHIP OF MARION COUNTY.

SIXTH DISTRICT INCLUDES WASHINGTON TOWNSHIP, PIKE TOWNSHIP, WAYNE TOWNSHIP, DECATUR TOWNSHIP, PERRY TOWNSHIP, FRANKLIN TOWNSHIP OF MARION COUNTY.

| DIST. | POP. | PERFECT DIST. POP. VARIANCE | PERCENTAGE POP. VARIANCE |
|---|---|---|---|
| 1 | 427,267 | 3,404+ | .0080+ |
| 2 | 423,227 | 636- | .0015- |
| 3 | 418,220 | 5,643- | .0133- |
| 4 | 423,824 | 39- | .00009- |
| 5 | 419,765 | 4,098- | .0096- |
| 6 | 428,197 | 4,334+ | .0102+ |
| 7 | 426,620 | 2,757+ | .0065+ |
| 8 | 424,760 | 897+ | .0021+ |
| 9 | 425,360 | 1,497+ | .0035+ |
| 10 | 417,158 | 6,705- | .0158- |
| 11 | 428,100 | 4,237+ | .0099+ |

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | |
|---|---|
| NELSON G. GRILLS, Plaintiff, DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY, Intervening Plaintiffs, JOSEPH W. SUMMERS, Intervening Plaintiff, | ) |
| -vs- | ) NO. IP 64-C-101 |
| ROGER D. BRANIGIN, EDWIN M. S. STEERS, THURMAN M. DeMOSS, As Members of the State Election Board of Indiana, Defendants. | ) |

CORRECTED AND SUPERSEDING
DISSENTING OPINION

I respectfully dissent from so much of the majority opinion as purports to mandate the defendant members of the State Election Board of Indiana, and others not parties to this action, to conduct elections for the office of

representative in the Congress of the United States from the State of Indiana from eleven districts created by them. I agree that the defendants should be instructed as to how such elections should be conducted, in accordance with their prayer; and I further agree that this court has jurisdiction to, and should do so. It is not, however, constitutionally permissible for this court to enter the political arena as the majority has done, and to impose upon the powers of a coordinate political department, the General Assembly of Indiana, by adopting a districting scheme of its own devising, bearing no reasonable relationship to the plan last adopted by the General Assembly.[1]

1. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for

The plain error into which the majority has fallen is that it has misconceived the failure of the politically divided General Assembly to enact a new districting plan to have somehow given carte blanche to this court, or to a majority thereof, to usurp all legislative prerogatives; and to attack the problem as if Chapter 205 of the Acts of 1965 (hereafter "Chapter 205") had never been enacted. But such is not the law. On the contrary, all courts which have

---

1(contd.)
resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestionable adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."
Baker v. Carr, 1962, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663, 686.

spoken on the subject have unanimously held that the judicial power is limited to reviewing the last (albeit unconstitutional) legislative act, and to making such corrections as are necessary to bring it into conformity with the "one man, one vote" principle.[2] This must be so, since it has long been the law that the courts have no power to perform administrative acts.[3]

I now consider the plan of the majority to determine whether it exceeds the bounds of

---

2. Maryland Committee for Fair Cong. Redist. v. Tawes, D. Md., 1966, 253 F. Supp. 731, aff'd. sub nom. Alton v. Tawes, 384 U.S. 315, 16 L. Ed. 2d 586; Klahr v. Goddard, D. Ariz., 1966, 250 F. Supp. 537; People v. Kerner, 1965, 33 Ill. 2d 460, 211 N. E. 2d 736.

3. O'Donoghue v. United States, 1933, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356; Old Colony Trust Company v. Commissioner of Internal Revenue, 1929, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 918.

necessity. According to the districting adopted by Chapter 205, three districts contained less than the optimum population of 423,863, by a total of 111,629 persons;[4] the other eight districts therefore had a similar total overage. It is apparent that if available census information is sufficiently detailed in its "building blocks" to enable the transfer of 111,629 persons from the eight larger districts to the three smaller districts in proper ratio, all districts may thus be made to conform completely to constitutional commandments. But the majority plan moves a total of 1,215,606 persons from districts created by Chapter 205 to other districts![5] This gross deviation of more than 1,000 per cent demonstrates beyond a doubt that the majority plan is not an objective one of

4. Table I, Appendix
5. Table II, Appendix

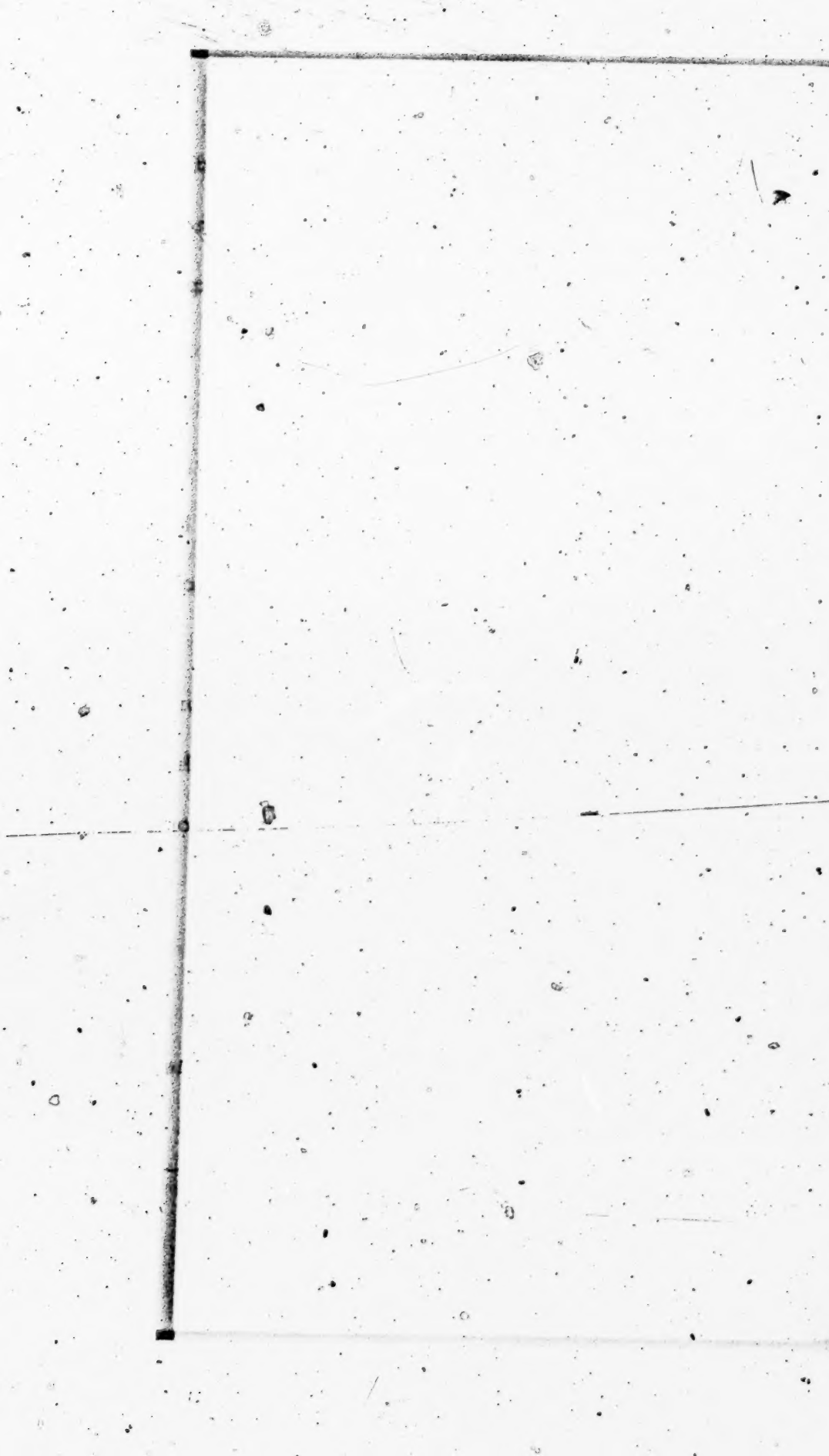
necessary correction, but rather is an original and novel plan conforming only to the subjective impulses of the majority.

It is true that the majority, after juggling approximately one-fourth of the total population of the State, has created eleven districts more balanced in population than those created by Chapter 205. But to do this, they have impermissibly taken what I shall call the "chain reaction" approach. Using this method, they have moved whole counties from districts already in close balance as created by Chapter 205 to other districts already overpopulated. This, of course, magnifies the problem already existing in the overpopulated districts, and requires the majority to remove from such districts more population than would have been required in the first instance. This goes on in

chain reaction from until the aforementioned total of 1,215,606 people and 26 out of 92 whole counties have been rearranged. As an example, the 5th District, as created by Chapter 205, was overpopulated by only 2,247 persons; to correct this district to perfection, therefore, would have required only that 2,247 persons be moved to an adjoining, underpopulated district, such as the 10th, and that no population be added. But the majority has completely reconstructed the 5th District by moving out of it the whole counties of Adams, Wells, Jay, Madison and Huntington,[6] and by moving into it the counties of Wabash, Fulton, Carroll, Cass, Clinton, Boone, Tipton and Hamilton. Of the original Chapter 205 district, only the counties of Miami, Howard, Grant and Blackford (total

---

6. Map attached to Table II, Appendix



population 198,042) remain constant!

The census figures are in sufficient detail to enable a court to correct the districting adopted by Chapter 205 to within approximately 100 votes per district, and in fact I have done so.[7] My corrected plan has a maximum deviation of plus 118 in the 4th District and minus 93 in the 2nd District. The ratio of the largest to the smallest district in terms of population may thus be computed as 1.00056 to 1. Of equal importance, all corrections have been made in a constitutional rather than a random fashion in that the shifts invariably go from overpopulated districts to underpopulated districts, with one unavoidable exception, so as to disturb Chapter 205 boundaries by the absolute minimum.

---

7. Table III, Appendix

In accomplishing this result, I of course commence with the districts as laid out by Chapter 205.[8] The 1st District is overpopulated by 30,345, and must be corrected by the removal of approximately this number. The 1st District is contiguous only to the 2d District, so that the movement must be to that district, although it is already overpopulated by 7,201. This is the one unavoidable exception referred to in the preceding paragraph, wherein population is moved into an already overpopulated district. It is for this reason that it must be corrected first. By inspection of the census tracts and enumeration districts in the 1st District, I find a bloc of 30,297 persons in a geographic

---

8. Map attached to Table I, Appendix

area contiguous to the 2d District,[9] and correct the 1st District by moving such bloc to the 2d District, which now becomes overpopulated by a total of 37,498. All further movements will be direct from overpopulated to underpopulated districts.

The 2d District adjoins two underpopulated districts, the 3d and the 7th. Looking ahead, we perceive that the 4th District is overpopulated, and adjoins the overpopulated 2d, 5th and the underpopulated 3d. The 4th may, therefore, only move its surplus into the 3d, whereas the 2d may move either to the 3rd or to

---

9. The geographic area is in the southern part of Hobart Township, as follows: Census Tract HOT 56, population 16,934; Census Tract HOT 58, population 8.752; Census Enumeration Districts 16-N, 16-P, and East Gary 2, 3, 7 and 8 in Census Tract HOT 57, total population 4,611. (Metes and bounds descriptions set out in Table IV, Part 2, for areas other than counties and townships)

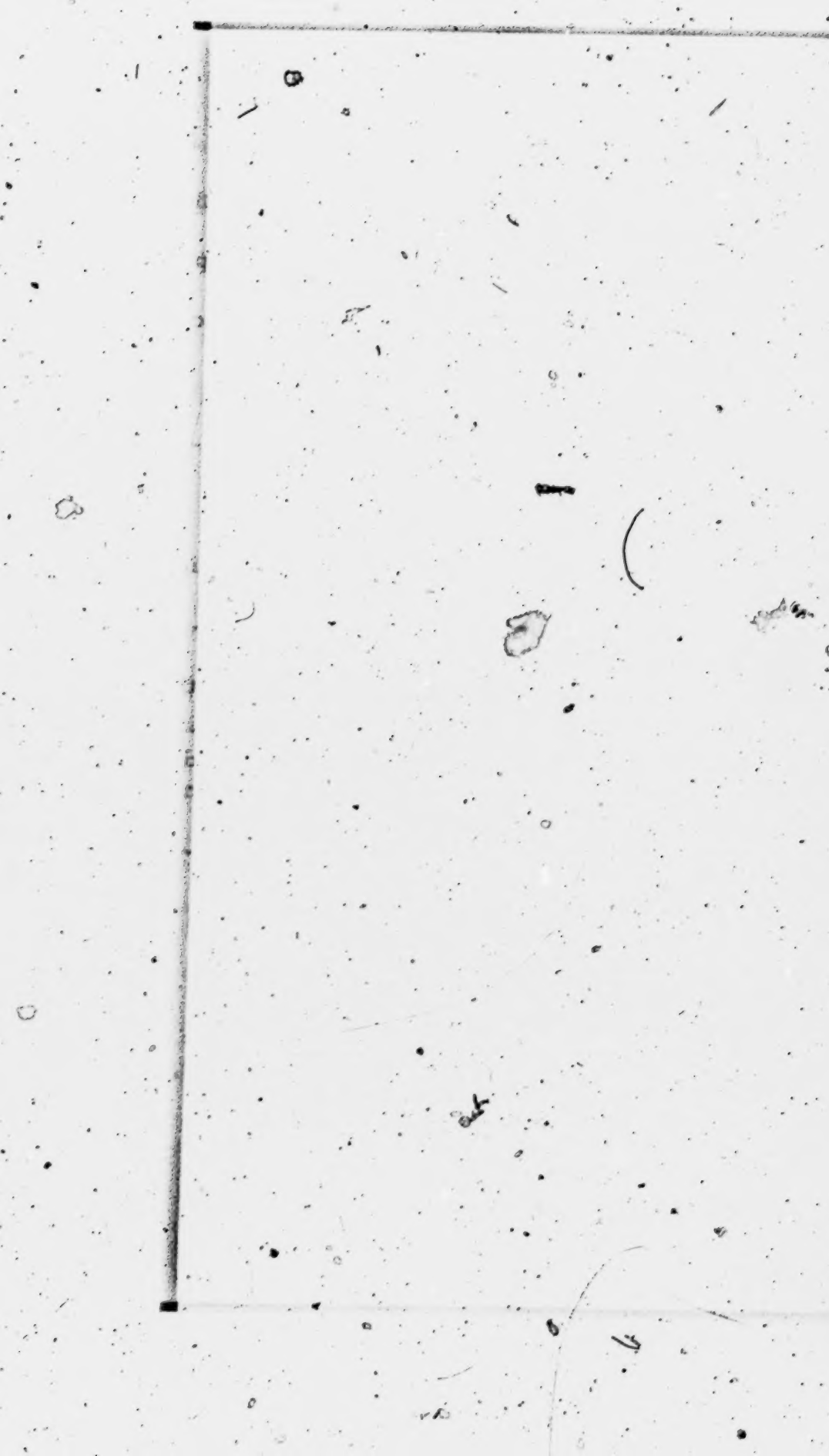
the 7th. We therefore first correct the 4th, by moving an area in Elkhart County,[10] population 26,956, into the 3d. The 3d is still underpopulated, so we correct it completely and correct the 2d in part by moving townships in Porter, Jasper, Pulaski and Fulton Counties,[11] population 12,760, into the 3d. We now complete the correction of the 2d by moving the townships in Benton and Tippecanoe Counties,[12] population 24,831, into the 7th. Correction of the 7th

---

10. Cleveland and Baugo Townships, combined population 7,206, and Census Enumeration Districts 8-N, 9-N, 10-19, inclusive, 29, 34, 35, 36 and 38-N, all in Concord Township in the City of Elkhart, containing a population of 19,750.

11. For townships see Table III.

12. All of Benton County, except Union Township thereof, population 11,372; Townships of Jackson, Lauramie, Randolph, Sheffield, Shelby, Union, Wayne and Wea of Tippecanoe County, total population 13,459.



is continued, and at the same time the 8th is corrected completely by moving Martin County and townships off of the north part of Knox County,[13] total population 19,277, from the 8th to the 7th. Correction of the 7th is completed by the transfer to it of certain townships of Hendricks and Morgan Counties,[14] population 10,196, from the overpopulated 6th. Correction of the 6th is completed by transfer of a population of 4,921 out of Warren Township of Marion County[15] to the underpopulated 10th.

---

[13] Widner, Vigo and Steen Townships.

[14] Franklin and Clay Townships of Hendricks County, total population 2,977; Adams, Ashland, Clay, Gregg and Jefferson Townships of Morgan County, total population 7,219.

[15] The geographic area transferrred is a part of Warren Township of Marion County, being Census Enumeration Districts 137-P, 138-P, 138-R, 427, 428-N, 428-Pa and 428-Pb, all in Census Tract 601, and containing a total population of 4,921.

Finally, the 5th,[16] 9th,[17] and 11th[18] are each corrected by transfers into the 10th, which is finally corrected thereby.

The corrections above set out are the only proper ones. It is immaterial whether the adjustments are made in the precise order in which I have listed them for illustrative purposes, or in some other order. It is required that the 1st District be adjusted first, to avoid impermissible and unnecessary "chain

---

[16] Jackson Township of Blackford County, population 1,527, and Union Township of Howard County, population 769.

[17] Fugit Township of Decatur County, population 1,071.

[18] The geographic area transferred is a part of Center Township of Marion County, contained in Census Tract 506, Census Enumeration District 194 of Census Tract 523, and Census Enumeration District 123 of Census Tract 507, containing a total population of 9,274.

reaction" transfers. But once this correction is made, it is absolutely immaterial whether the next district adjusted is the 8th, the 11th, the 5th, or any other district. If the rule of avoiding unnecessary transfers is observed, the results must be the same.[19]

The majority adopts the argument found wanting on the first appeal of this case,[20] to the effect that their new plan is better than the one it would supersede. But they can not prevail on this basis, as their maximum variance between

---

[19] e.g., Assume starting with the overpopulated 8th: the transfer must be to the 7th, because the other adjacent district, the 9th, is also overpopulated; the only underpopulated district touched by the overpopulated 5th and 11th is the 10th, so their transfers must be to it, etc.

[20] Duddleston v. Grills, 385 U.S. 455, vacating and remanding Grills v. Branigin, S.D. Ind., 1966, 255 F.Supp. 155; cf. Swann v. Adams; 385 U.S. 440, 87 S.Ct. 569.

overpopulated and underpopulated districts is 11,039 – or approximately fifty times higher than my variance of 235. However, I do not argue the numbers game; I simply point out the figures. They attempt the further justification that they do not split counties. But there is nothing sacred about a county, or for that matter a township or a city. These political subdivisions of the State exist purely for i convenience for the purpose of assessing and collecting ad valorem taxes, and performing various administrative chores. The constitutionality of splitting political subdivisions has been established by the decision of the Supreme Court of the United States affirming such a plan;[21] hence the excuse advanced by the

---

[21] Alton v. Tawes, 384 U.S. 315, 16 L. Ed. 2d 586, affirming Maryland Committee for Fair Cong. Redist. v. Tawes, D. Md., 1966 253 F. Supp. 731

majority for their plan is not a satisfactory explanation for their curious moving from district to district of approximately 25 per cent of the population of the State.

I must therefore dissent from that which I firmly believe to be the unconstitutional assumption of a power vested exclusively in the General Assembly by Article 1, Section 4 of the Constitution by a court which further lacks the jurisdiction to do so by reason of the limited powers granted to it by Article 3, Section 2 of the Constitution. The action of the majority is thus doubly unconstitutional, if such a thing be possible.

My dissenting opinion, filed February 14, 1968, contained an error in my suggested correction of the 3d District. I have therefore revised the townships to be transferred from

the 2d to the 3d District, and the appropriate tables. The corrected opinion is republished in its entirety, in the interest of clarity, and therefore supersedes completely the original opinion.

Dated this 26th day of February, 1968.

/S/ S. Hugh Dillin
S. Hugh Dillin, Judge,
U.S. District Court,
Assigned Trial Judg
and Member of the Three-
Judge Trial Court

# A P P E N D I X.

[Containing Table I (with map), Table II (with map), Table III (with map), and Table IV, Parts 1 and 2]

TABLE I

SHOWING POPULATIONS OF THE VARIOUS CONGRESSIONAL DISTRICTS OF INDIANA AS ESTABLISHED BY CHAPTER 205, ACTS OF THE INDIANA GENERAL ASSEMBLY OF 1965, AND VARIANCES THEREIN.

| District | Population | Variance from Average | |
|---|---|---|---|
| | | Over-populated | Under-populated |
| 1 | 454,208 | + 30,345 | |
| 2 | 431,064 | + 7,201 | |
| 3 | 384,079 | | -39,784 |
| 4 | 450,937 | + 27,074 | |
| 5 | 426,110 | + 2,247 | |
| 6 | 438,961 | + 15,098 | |
| 7 | 369,663 | | -54,200 |
| 8 | 443,252 | + 19,389 | |
| 9 | 424,933 | + 1,070 | |
| 10 | 406,218 | | -17,645 |
| 11 | 433,073 | + 9,210 | |
| | 4,662,498 | +111,634 | 111,629 |

NOTES

1. Total Population, 1960 Census = 4,662,498

2. Ideal District Population = 4,662,498/11 = 423,863 (Since the indicated division leaves a remainder of 5, the

(continued)

overpopulated district total population exceeds that of the underpopulated total by this amount.)

3. Configuration of Districts is as shown graphically on attached outline map. All Districts contain complete counties, as indicated, except as follows:

(a) The 1st District consists solely of North, Calumet, and Hobart Townships of Lake County.

(b) The 2d District consists of complete counties as indicated on the map, plus all of Lake County except North, Calumet, and Hobart Townships.

(c) The 6th District consists of complete counties as indicated on the map, plus Pike, Washington, Decatur, Perry, Franklin, and

(continued)

Warren Townships of Marion County.

(d) The 10th District consists of complete counties as indicated on the map, plus Lawrence Township of Marion County.

(e) The 11th District consists solely of Center and Wayne Townships of Marion County.

Indiana
Congressional
Districts
(Ch. 205, 1965 Acts).

County population
figures per
1960 census.

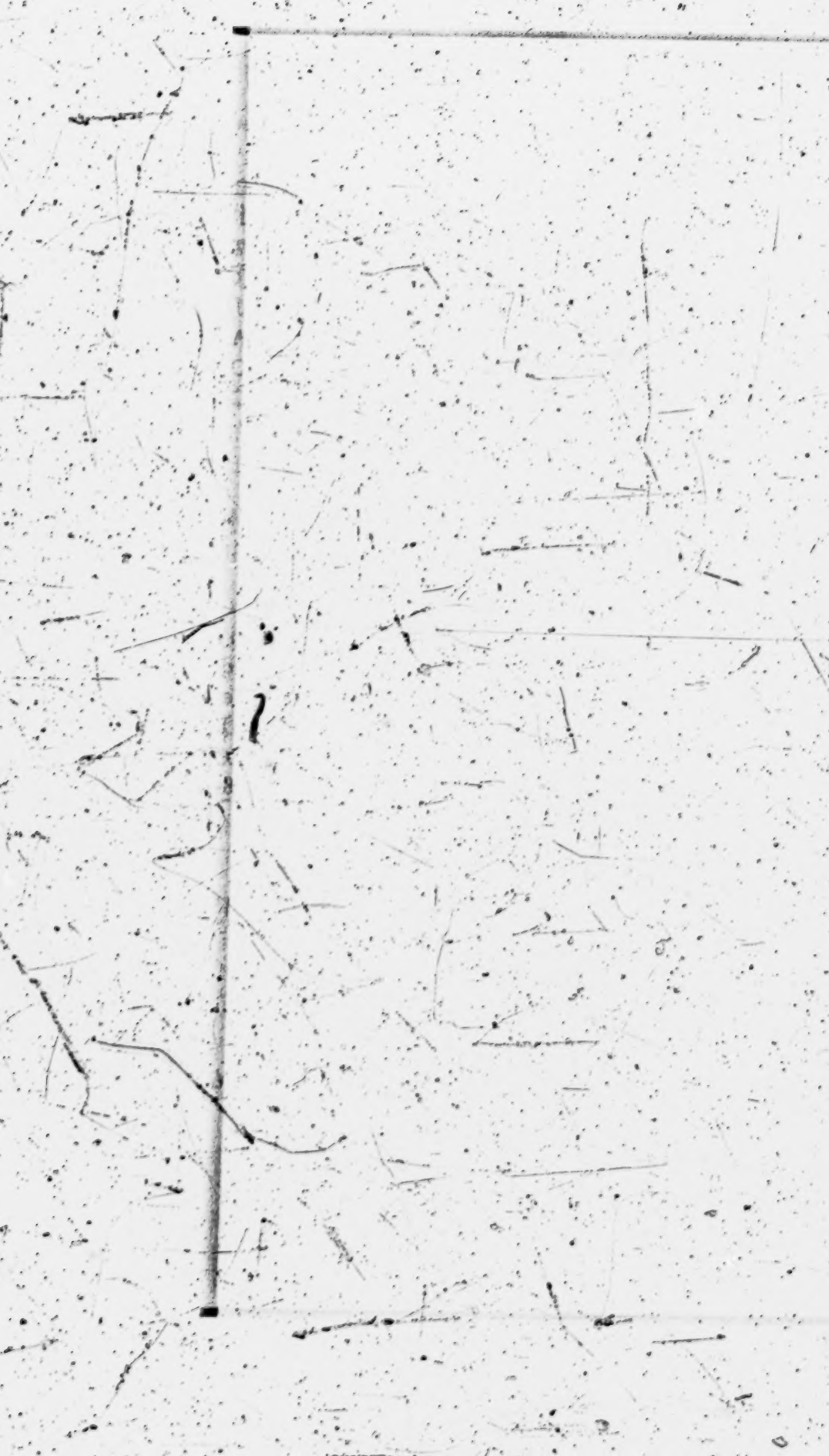
Note: Marion
& Lake County
figures broken
down into
various parts
(as indicated).

[Irrelevant detail on Judge Dillin's
map has been omitted from this copy.]

## TABLE II

SHOWING COUNTIES AND PARTS OF COUNTIES SHIFTED BY THE MAJORITY REDISTRICTING PLAN FROM ONE CHAPTER 205 DISTRICT TO ANOTHER, THE RESPECTIVE POPULATIONS THEREOF, AND THE POPULATION AMOUNTS REQUIRED TO HAVE BEEN MOVED TO HAVE ACHIEVED NECESSARY CORRECTIONS TO THE DISTRICTING PLAN CONTAINED IN CHAPTER 205, ACTS OF THE 1965 GENERAL ASSEMBLY OF INDIANA

| Dist. No. | Area Removed from Dist. | Dist. To Which Trans-ferred | 1960 Popu-lation of Area Removed | Number Neces-sary To Hav Been Re-duced To Achieve Popula-tion Of 423,863 |
|---|---|---|---|---|
| 1 | Hobart Twp. of Lake County | 2 | 39,223 | 30,345 |
| 2 | St. Johns Twp. of Lake Co. | 1 | 12,282 | ( |
| | Kosciusko Co. | 3 | 40,373 | (37,546[1] |
| | Wabash Co. | 5 | 32,605 | ( |
| | Cass Co. | 5 | 40,931 | ( |
| | Fulton Co. | 5 | 16,957 | ( |
| | Carroll Co. | 5 | 16,934 | ( |



| Dist. No. | Area Removed From Dist. | Dist. To Which Trans-ferred | 1960 Popu-lation of Area Removed | Number Necessary To Have Been Re-duced To Achieve Population Of 423,863 |
|---|---|---|---|---|
| 3 | LaPorte Co. | 2 | 95,111 | |
| | Starke Co. | 2 | 17,911 | 0 |
| 4 | Elkhart Co. | 3 | 106,790 | 27,074 |
| 5 | Huntington Co. | 4 | 33,814 | |
| | Wells Co. | 4 | 21,220 | |
| | Adams Co. | 4 | 24,643 | 2,247 |
| | Jay Co. | 10 | 22,572 | |
| | Madison Co. | 10 | 125,819 | |
| 6 | Clinton Co. | 5 | 30,765 | |
| | Boone Co. | 5 | 27,543 | |
| | Montgomery Co. | 7 | 32,089 | |
| | Hendricks Co. | 7 | 40,896 | 15,098 |
| | Warren Twp. of Marion Co. | 11 | 60,344 | |
| 7 | Daviess Co. | 8 | 26,636 | 0 |
| 8 | Martin Co. | 7 | 10,608 | |
| | Floyd Co. | 9 | 51,397 | 19,389 |

| Dist. No. | Area Removed From Dist. | Dist. To Which Trans-ferred | 1960 Popu-lation of Area Removed | Number Necessary To Have Been Re-duced To Achieve Population Of 423,863 |
|---|---|---|---|---|
| 9 | Orange Co. | 8 | 16,877 ( | |
| | Shelby Co. | 6 | 34,093 ( | 1,070 |
| 10 | Tipton Co. | 5 | 15,856 ( | |
| | Hamilton Co. | 5 | 40,132 ( | |
| | Hancock Co. | 6 | 26,665 ( | |
| | Rush Co. | 6 | 20,393 ( | |
| | Lawrence Twp. of Marion Co. | 11 | 34,405 ( | 0 |
| 11 | Wayne Twp. of Marion Co. | 6 | 99,722 | 9,210 |
| | Totals | | 1,215,606 | 141,979[2] |

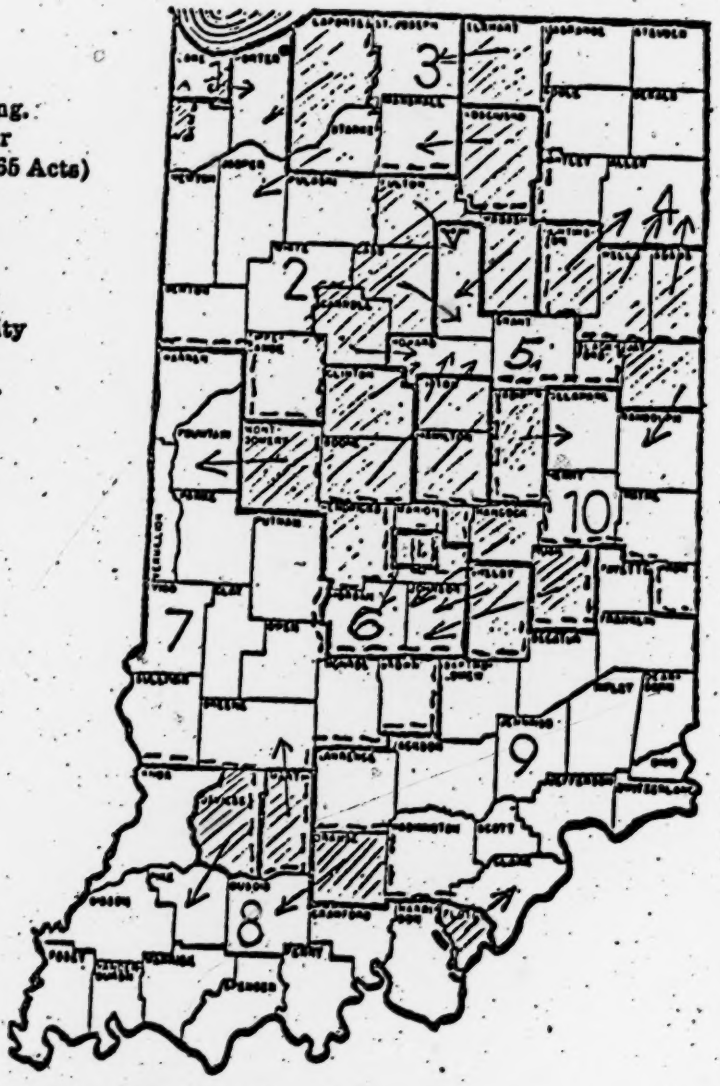
[1,2] Include the 30,345 transferred by necessity from the overpopulated 1st District to the overpopulated 2d District, thus requiring a retransfer out of the 2d District.

Note: A map showing the congressional district lines established by Chapter 205, and also the lines established by the majority of this court is attached hereto.

Indiana Cong. Districts per Ch. 205 (1965 Acts) shown by solid lines.

Districts as arranged by court majority shown by broken lines.

Counties moved by court are shaded.




[Irrelevant detail on Judge Dillin's map has been omitted from this copy.]

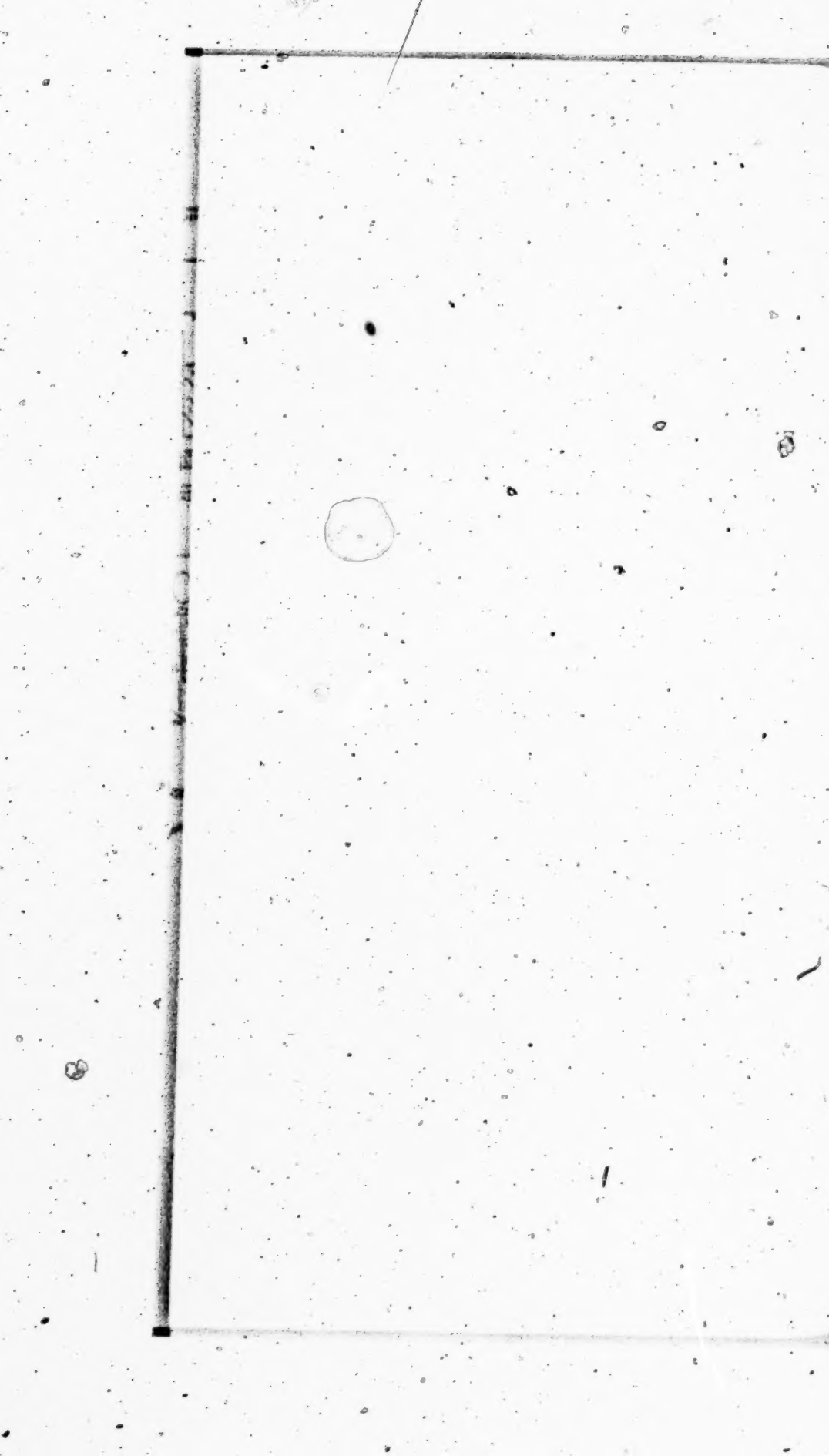


TABLE III

SHOWING THE PARTS OF COUNTIES (INCLUDING ONE COMPLETE COUNTY) SHIFTED BY MY CONSTITUTIONAL CORRECTIONAL PLAN FROM ONE CHAPTER 205 DISTRICT TO ANOTHER, THE RESPECTIVE POPULATIONS THEREOF, AND THE POPULATION AMOUNTS REQUIRED TO HAVE BEEN MOVED TO HAVE ACHIEVED NECESSARY CORRECTIONS TO THE DISTRICTING PLAN CONTAINED IN CHAPTER 205, ACTS OF THE 1965 GENERAL ASSEMBLY OF INDIANA

| Dist. No. | Area Removed From District | Dist. To Which Transferred | 1960 Population Of Area Removed | Number Necessary To Have Been Reduced to Achieve Population of 423,863 |
|---|---|---|---|---|
| 1 | Part of Hobart Twp. of Lake Co. (Table IV, Part 2) | 2 | 30,297 | 30,345 |
| 2 | Jackson, Morgan, Pine, Pleasant and Washington Twps. of Porter Co. | 3 | 8,034 | |

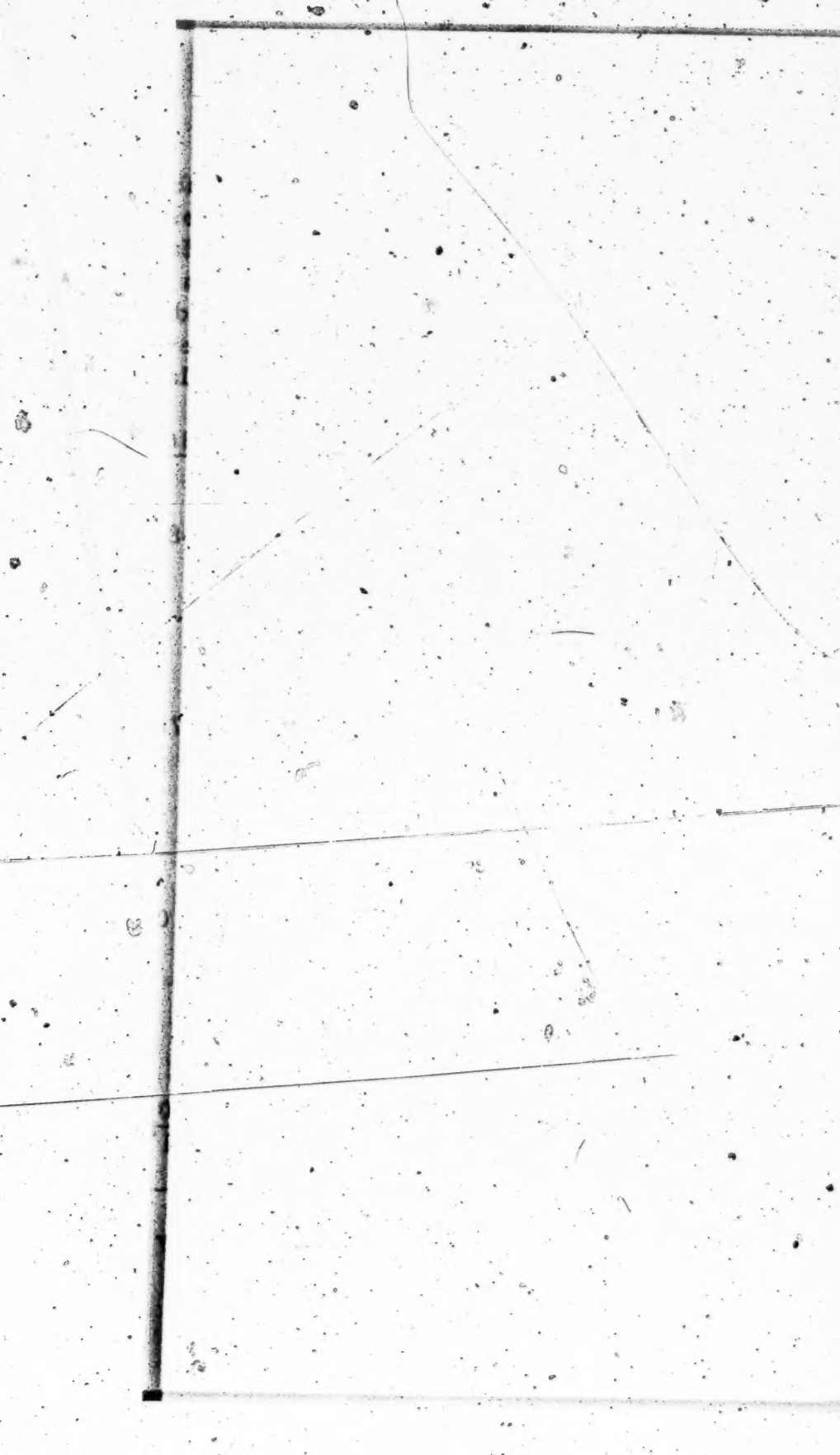
| Dist. No. | Area Removed From District | Dist. To Which Transferred | 1960 Population of Area Removed | Number Necessary To Have Been Reduced to Achieve Population of 423,863 |
|---|---|---|---|---|
| 2 | Kankakee Twp. of Jasper Co. | 3 | 576 | |
| | Cass, Franklin, Rich Grove and Tippecanoe Twps. of Pulaski Co. | 3 | 3,141 | 37,498[1] |
| | Aubbeenaubee Twp. of Fulton Co. | 3 | 1,009 | |
| | Jackson, Lauramie, Randolph, Sheffield, Shelby, Union, Wayne, and Wea Twps. of Tippecanoe County | 7 | 13,459 | |
| | Benton Co., except Union Twp. of such co. | 7 | 11,372 | |

| Dist No. | Area Removed From District | Dist To Which Transferred | 1960 Population of Area Removed | Number Necessary To Have Been Reduced to Achieve Population of 423,863 |
|---|---|---|---|---|
| 3 | Underpopulated District, No Chapter 205 area moved out | | 0 | 0 |
| 4 | Baugo and Cleveland Twps. of Elkhart Co. | 3 | 7,206 | 27,074 |
| | Part of Concord Twp. of Elkhart Co. (Table IV, Part 2) | 3 | 19,750 | |
| 5 | Jackson Twp. of Blackford Co | 10 | 1,527 | 2,247 |
| | Union Twp. of Howard Co. | 10 | 769 | |

| Dist. No. | Area Removed From District | Dist. To Which Transferred | 1960 Population of Area Removed | Number Necessary To Have Been Reduced to Achieve Population of 423,863 |
|---|---|---|---|---|
| 6 | Part of Warren Twp. of Marion Co. (Table IV, Part 2) | 10 | 4,921 | |
| | Franklin and Clay Twps. of Hendricks Co. | 7 | 2,977 | 15,098 |
| | Adams, Ashland, Clay, Gregg and Jefferson Twps. of Morgan Co. | 7 | 7,219 | |
| 7 | Underpopulated Dist., No Chapter 205 area moved out | | 0 | 0 |

| Dist. No. | Area Removed From District | Dist. To Which Trans-ferred | 1960 Popu-lation of Area Removed | Number Necessary To Have Been Re-duced To Achieve Population Of 423,863 |
|---|---|---|---|---|
| 8 | Martin Co. Widner, Vigo and Steen Twps. of Knox Co. | 7 | 10,608 | 19,389 |
| | | 7 | 8,669 | |
| 9 | Fugit Twp. of Decatur Co. | 10 | 1,071 | 1,070 |
| 10 | Underpopu-lated Dist., No Chapter 205 area moved out | | 0 | 0 |
| 11 | Part of Center Twp. of Marion Co. (Table IV, Part 2) | 10 | 9,274 | 9,210 |
| | Totals | | 141,879 | 141,931[2] |

[1,2] Include the 30,297 transferred by necessity from the overpopulated 1st District to the



1,2

overpopulated 2d District, thus requiring a retransfer out of the 2d District.

Notes: 1. Where Table IV, Part 2 is referred to in the above summary, the metes and bounds descriptions of areas transferred which do not follow county or township lines are set out in full in the written description of of corrected districts contained in such table.

2. A map showing the congressional district lines established by Chapter 205 and also the necessary corrections thereto made by myself is attached hereto.

[Irrelevant detail on Judge Dillin's map has been omitted from this copy.]

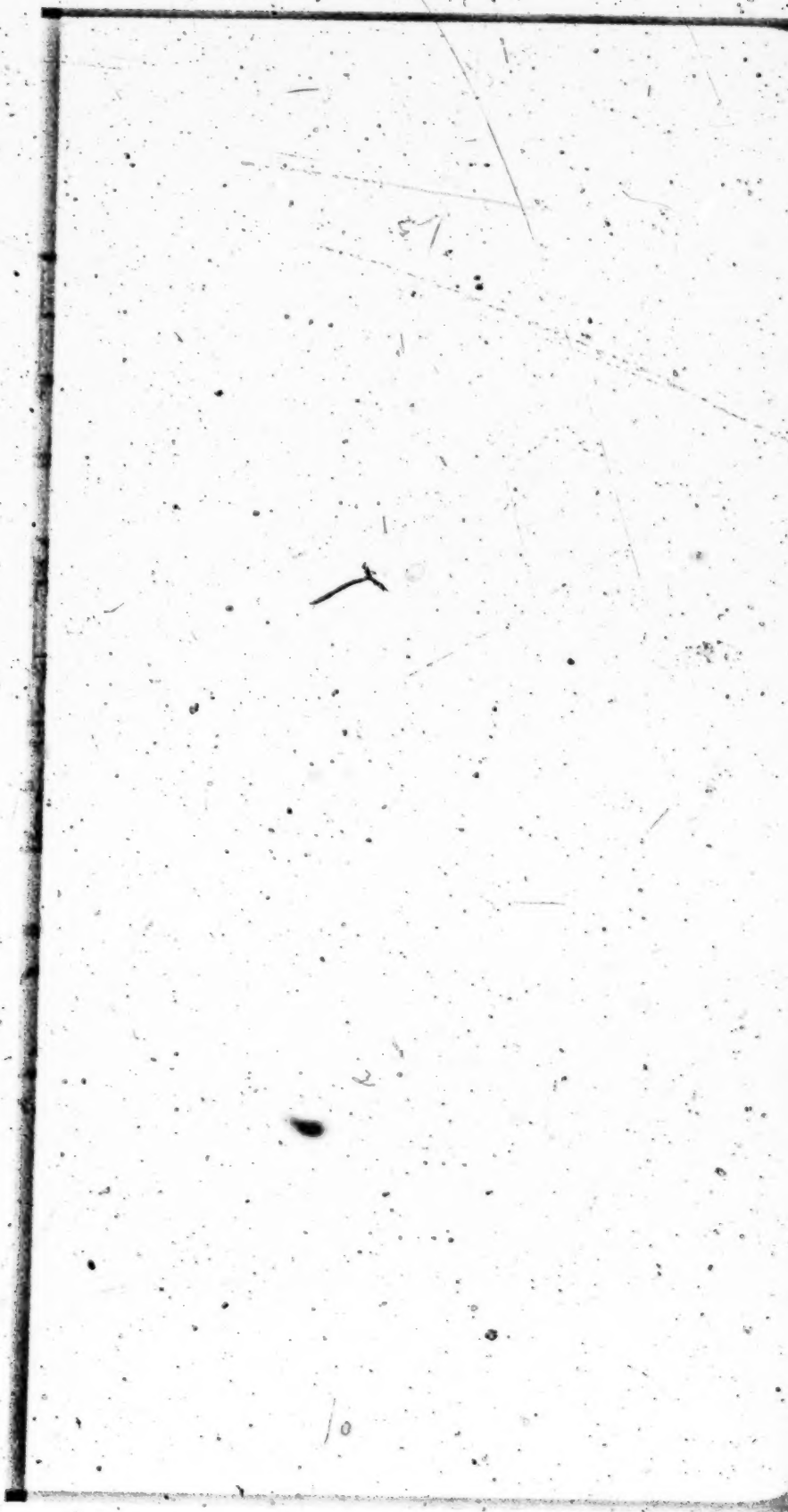


TABLE IV - Part 1

SHOWING POPULATIONS OF THE VARIOUS CONGRESSIONAL DISTRICTS OF INDIANA AS ESTABLISHED BY CHAPTER 205, ACTS OF THE INDIANA GENERAL ASSEMBLY OF 1965, AS CORRECTED IN A CONSTITUTIONAL MANNER

| District | Population | Variance from Average | |
|---|---|---|---|
| | | Over-populated | Under-populated |
| 1 | 423,911 | + 48 | |
| 2 | 423,770 | | - 93 |
| 3 | 423,795 | | - 68 |
| 4 | 423,981 | + 118 | |
| 5 | 423,814 | | - 49 |
| 6 | 423,844 | | - 19 |
| 7 | 423,967 | + 104 | |
| 8 | 423,975 | + 112 | |
| 9 | 423,862 | | - 1 |
| 10 | 423,780 | | - 83 |
| 11 | 423,799 | | - 64 |
| | 4,662,498 | + 382 | - 377 |

NOTES

1. Total Population, 1960 Census = 4,662,498

2. Ideal District Population = 4,662,498/11 = 423,863 (Since the indicated

division leaves a remainder of 5, the over-populated district total population exceeds that of the underpopulated total by this amount. )

TABLE IV - Part 2

SETTING OUT THE DESCRIPTIONS OF THE VARIOUS ELEVEN CONGRESSIONAL DISTRICTS IN INDIANA AS CORRECTED IN A CONSTITUTIONALLY PERMISSIBLE MANNER

FIRST DISTRICT

Calumet, North and Hobart Townships of Lake County, save and except a part of said Hobart Township more particularly described by metes and bounds as follows: Beginning at the southwest corner of said township, and running thence north to 29th Avenue, thence running east to Deep River, thence in an easterly direction, along and with said Deep River to Grand Boulevard, thence north to the right of way to the Michigan Central Railroad, thence in a northeasterly direction along and with said railroad to Union Street, thence south to Central Avenue, thence east to the township line, thence south along said township line to the southeast

corner of said Hobart Township, thence west to the place of beginning.

## SECOND DISTRICT

The counties of Carroll, Cass, Kosciusko, Newton, Wabash and White; also, that part of Hobart Township of Lake County described as follows: Beginning at the southwest corner of said township, and running thence north to 29th Avenue, thence running east to Deep River, thence in an easterly direction, along and with said Deep River to Grand Boulevard, thence north to the right of way to the Michigan Central Railroad, thence in a northeasterly direction along and with said railroad to Union Street, thence south to Central Avenue, thence east to the township line, thence south along said township line to the southeast corner of said Hobart Township,

thence west to the place of beginning; also, the townships of Cedar Creek, Center, Eagle Creek, Hanover, Ross, St. John, West Creek, and Winfield in Lake County; also, the townships of Boone, Center, Liberty, Portage, Porter, Union and Westchester in Porter County; also, Union Township in Benton County; also, the townships of Fairfield, Perry, Tippecanoe, Wabash and Washington in Tippecanoe County; also, the townships of Barkley, Carpenter, Gillam, Hanging Grove, Jordan, Keener, Marion, Milroy, Newton, Union, Walker, and Wheatfield in Jasper County; also, the townships of Beaver, Harrison, Indiana Creek, Jefferson, Monroe, Salem, Van Buren, and White Post in Pulaski County; also, the townships of Henry, Liberty, Newcastle, Richland, Rochester, Union and Wayne in Fulton

County.

THIRD DISTRICT

The counties of LaPorte, Marshall, Starke, and St. Joseph; also, Baugo and Cleveland Townships in Elkhart County; also, a part of Concord Township in Elkhart County described as follows: All that part of the City of Elkhart lying in Concord Township and being north of the right of way of the New York Central Railroad Company, and also a part thereof beginning at the intersection of Oakland Avenue and the right of way of the said New York Central Railroad Company, and running northeasterly along and with said right of way to South Main Street, thence southeasterly along and with said street to Hickory Street, thence southwesterly along and with Hickory Street to South 6th Street, thence south to West Indiana Avenue, thence east to Benham Avenue, thence south to Wolf Avenue,

thence west to Eighth Street, thence south to Lusher Avenue, thence west to Oakland Avenue, thence north to the place of beginning; also, the townships of Jackson, Morgan, Pleasant, Pine, and Washington in Porter County; also, Kankakee Township in Jasper County; also Cass, Franklin, Rich Grove, and Tippecanoe Townships in Pulaski County; also, Aubbeebaubbee Township in Fulton County.

FOURTH DISTRICT.

The counties of Allen, DeKalb, LaGrange, Noble, Steuben and Whitley; also, the townships of Benton, Clinton, Elkhart, Harrison, Jackson, Jefferson, Locke, Middlebury, Olive, Osolo, Union, Washington and York in Elkhart County; also, all of Concord Township in Elkhart County except that part described as follows. All that part of the City

of Elkhart lying in Concord Township and being north of the right of way of the New York Central Railroad Company, and also a part thereof beginning at the intersection of Oakland Avenue and the right of way of the said New York Central Railroad Company, and running northeasterly along and with said right of way to South Main Street, thence southeasterly along and with said street to Hickory Street, thence southwesterly along and with Hickory Street to South 6th Street, thence south to West Indiana Avenue, thence east to Benham Avenue, thence south to Wolf Avenue, thence west to 8th Street, thence south to Lusher Avenue, thence west to Oakland Avenue, thence north to the place of beginning.

FIFTH DISTRICT

The counties of Adams, Grant, Jay,

Huntington, Madison, Miami and Wells; also, the townships of Harrison, Licking and Washington in Blackford County; also, the townships of Center, Clay, Ervin, Harrison, Honey Creek, Howard, Jackson, Liberty, Monroe and Taylor in Howard County.

SIXTH DISTRICT

The counties of Boone, Clinton, Johnson and Montgomery; also, the townships of Brown, Center, Eel River, Guilford, Liberty, Lincoln, Marion, Middle, Union and Washington in Hendricks County; also, the townships of Baker, Brown, Greene, Harrison, Jackson, Madison, Monroe, Ray and Washington in Morgan County; also, the townships of Pike, Washington, Decatur, Perry and Franklin in Marion County, also, Warren Township in Marion County except a part thereof beginning at the northwest corner of said township and running thence south to 25th

Street, thence east to Hawthorne, thence south to 21st Street, thence east to Ritter Avenue, thence north to the right of way of the C. C. C. & St. L. Railroad, thence northeasterly along said railroad right of way to Arlington Avenue, thence north to the township line of said Warren Township, thence west to the place of beginning.

## SEVENTH DISTRICT

The counties of Brown, Clay, Daviess, Fountain, Greene, Martin, Monroe, Owen, Parke, Putnam, Sullivan, Vermillion, Vigo, and Warren; also, the townships of Bolivar, Center, Gilboa, Grant, Hickory Grove, Oak Grove, Parish Grove, Pine, Richland and York in Benton County; also, the townships of Jackson, Lauramie, Randolph, Sheffield; Shelby, Union, Wayne and Wea in Tippecanoe County;

also, the townships of Clay and Franklin in Hendricks County; also, the townships of Adams, Ashland, Clay, Gregg and Jefferson in Morgan County; also, the townships of Widner, Vigo and Steen in Knox County.

EIGHTH DISTRICT

The counties of Crawford, Dubois, Floyd, Gibson, Harrison, Perry, Pike, Posey, Spencer, Vanderburgh and Warrick; also, the townships of Busseron, Decker, Harrison, Johnson, Palmyra, Vincennes and Washington in Knox County.

NINTH DISTRICT

The counties of Bartholomew, Clark, Dearborn, Fayette, Franklin, Jackson, Jefferson, Jennings, Lawrence, Ohio, Orange, Ripley, Scott, Shebly, Switzerland and Washington; also, the townships of Adams, Clay,

Clinton, Jackson, Marion, Salt Creek, Sand Creek and Washington in Decatur County.

TENTH DISTRICT

The counties of Delaware, Hamilton, Hancock, Henry, Randolph, Rush, Tipton, Union and Wayne; also, Fugit Township in Decatur County; also, Lawrence Township in Marion County, also, a part of Warren Township in Marion County described as follows: Beginning at the northwest corner of said township and running thence south to 25th Street, thence east to Hawthorne thence south to 21st Street, thence east to Ritter Avenue, thence north to the right of way of the C. C. C. & St. L. Railroad, thence northeasterly along said railroad right of way to Arlington Avenue, thence north to the township line of said Warren Township, thence west to the place of beginning, also, a part of Center Township in Marion County described as follows: Beginning

at the northeast corner of said township, and running thence west on 38th Street to Dearborn Street, thence south to 34th Street, thence east to Gale Street, thence south to 33d Street, thence in a southeasterly direction along 33d Street to Sherman Drive, thence south to 30th Street, thence east to Emerson Avenue, thence north to the place of beginning; also, Jackson Township of Blackford County; also, Union Township of Howard County.

ELEVENTH DISTRICT

Wayne Township of Marion County; also, Center Township of Marion County, except a part of said Center Township described as follows: Beginning at the northeast corner of said township, and running thence west on 38th Street to Dearborn Street, thence south to

34th Street, thence east to Gale Street, thence south to 33d Street, thence in a southeasterly direction along 33d Street to Sherman Drive, thence south to 30th Street, thence east to Emerson Avenue, thence north to the place of beginning.

All references are to existing lines as the same were established and fixed on December 31, 1960.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

**No. 1252**

ROGER D. BRANIGIN, EDWIN M. S. STEERS,
THURMAN M. DEMOSS, AS MEMBERS OF THE
STATE ELECTION BOARD OF INDIANA,
JOSEPH W. SUMMERS,
NELSON G. GRILLS,

*Appellants,*

*vs.*

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER,
MILES H. MARSHALL, LOUIS Y. MUNDY,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

## MOTION TO DISMISS OR AFFIRM.


LESLIE DUVALL,
WILLIAM H. SPARRENBERGER,
*Attorneys for Appellees Duddleston, Gallagher, Marshall and Mundy.*

SPARRENBERGER, DUVALL, TABBERT
& LALLEY,
*Attorneys at Law,*
1126 Fidelity Building,
Indianapolis, Indiana 46204,
639-5444.


THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

No. .....

ROGER D. BRANIGIN, EDWIN M. S. STEERS,
THURMAN M. DEMOSS, AS MEMBERS OF THE
STATE ELECTION BOARD OF INDIANA,
JOSEPH W. SUMMERS,
NELSON G. GRILLS,

*Appellants,*

*vs.*

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER,
MILES H. MARSHALL, LOUIS Y. MUNDY,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

## MOTION TO DISMISS OR AFFIRM.

Appellees move the Court to dismiss the appeal herein on the ground hereinafter set forth or to affirm the judgment sought to be reviewed on the Appeal by members of the State Election Board of Indiana on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Rule 16 (1) (c) authorizes filing a Motion to Dismiss or Affirm the judgment sought to be reviewed on appeal from a Federal Court for the above stated cause.

## I. APPELLANTS' JURISDICTIONAL STATEMENT IS NOT CONCISE.

Rule 15 (1) (d) requires "a concise statement of the case containing the facts material to the consideration of the questions presented." The Jurisdictional Statement filed on behalf of Appellant State Election Board is rambling and argumentative. It conforms to no definition of "concise". After page 17 thereof it becomes primarily a diatribe critical of what Appellants consider the political consequences of the decree of the three-judge Federal panel. Said appeal should be dismissed for its failure to comply with Rule 15 (1) (d).

## II. NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED BY APPELLANT MEMBERS OF THE STATE ELECTION BOARD OF INDIANA.

Rule 15 (1) (f) requires "a statement of the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution." Appellants allege four questions (Appellants' Jurisdictional Statement, page 6). These four questions express in different language the following basic proposition: Where a state law establishing congressional districts has been ruled unconstitutional and a Federal District Court is requested to establish districts in lieu thereof, that Court has *no* power other than to maintain the existing, albeit unconstitutional, congressional districts making only such population adjustments between them as will result in a de minimus variance from the optimum. The necessary corollary to this proposition is that

*no consideration whatsoever* can be given to the integrity of county lines or other governmental units, historical patterns or geographic boundaries. Appellants' proposition has no basis in law either as announced by this Court or by six Federal District Courts which have, in fact, redistricted. This motion is not the place for detailed examination of all these Federal Court redistricting decrees. Brief examination of the Maryland case, which this Court has reviewed and approved, will suffice. *Maryland Citizens Committee, etc.* v. *Tawes,* 253 F. Supp. 731 (D. Md. 1966) affirmed sub nom. *Alton* v. *Tawes,* 384 U. S. 315.

Maryland has twenty-one counties. Of these twenty-one, boundary line integrity of only three was violated. Two very large counties, Montgomery (340,000) and St. Georges (357,000) were not split. The only three counties that were split were Baltimore, Anne Arundel and Howard Counties. Baltimore County had to be split because of its excessive population. Anne Arundel and Howard are both adjacent to Baltimore County and had to be added to residual portions of Baltimore County to complete districts. The First District consists of the Bay area counties which are sparsely populated. The three-judge panel in the Maryland case expressly removed Harford County from the old First District and added Calvert and St. Marys Counties (along with part of Anne Arundel County) to form the new First District. Under Appellants' novel theory the Maryland Court could not have made any changes in the old First District except to add sufficient population to bring that district from 14.9% below the optimum up to the optimum. This could have been done by pulling population out of Baltimore County, since Harford County (part of the old First District) is adjacent to Baltimore County and since Baltimore County had to be divided in any event. The Dis-

trict Court's *rejection* of such an approach was necessarily approved by this Court in *Alton* v. *Tawes*. The three-judge panel in the Maryland case stated:

> "Some departure from the ideal is, of course, inevitable. The equality which the Constitution commands allows, however, only minor deviations which may occur in the recognition of rational and legitimate factors, free from the taint of arbitrariness, irrationality and discrimination." (Page 733)

On page 734 of that Opinion, the Court stated:

> "A basic goal has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city. We think that our plan makes the districts as compact as possible and in the few cases where it was deemed necessary to split a county, we have taken into account the character of the neighborhoods involved."

Appellants' unusual theory, that county lines can be given *no consideration whatsoever*, flies in the face of this Court's decision in *Reynolds* v. *Sims*, 84 S. Ct. 1362 (1964) page 1391:

> "A state may legitimately desire to maintain the integrity of various political subdivisions insofar as possible and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting without any regard for political subdivisions or natural or historical boundaries may be little more than an open invitation to partisan gerrymandering."

While it must be admitted that Congress has not, as yet, devised a formula to ensure compact and contiguous districts, the desirability of obtaining such a formula is unquestioned. A quick look at the dissenting judge's map of

grotesquely formed districts side by side with the majority's map of compact and regularly formed districts provides eloquent testimony in support of the language of this Court quoted from *Reynolds* v. *Sims* and the stamp of approval placed by this Court on *Maryland Citizens Committee* v. *Tawes.*

Appellants quote at great length from the jurisdictional statement filed by Appellees in the prior litigation (*Duddleston, et al.* v. *Grills,* 385 U. S. 455). Appellants here (Appellees there) had this to say at pages 6 and 7 of their Motion to Affirm:

> "A county, when necessary, may be so divided that portions of it are contained in different congressional districts. Nevertheless, the county is a unit whose existence must be considered. The state's machinery for conduct of elections is based on that unit. The organization of the political parties sponsoring candidates in an election is based on that unit. The voters in an election consider themselves members of that unit. Any practicable scheme of congressional districting must be based on that unit especially when as in the instant situation a scheme based on that unit produces districts that are substantially equal. The use of smaller population units might produce districts more mathematically equal, but it would simultaneously produce chaotic elections and confused voters."

Appellants have gone full cycle from basic reliance upon county units to a position which demands that a county line has absolutely no relevance whatsoever in constructing congressional districts. Appellants' novel theory is being practiced nowhere in these United States and has not been required to be practiced by any adjudication of this Court. Preservation of county lines could *not* be used as an excuse to save a congressional plan having a 20 percent variance from the optimum as was the case in the prior appeal. But where county lines can be preserved and population var-

iance brought within 2.6 percent total variance as has been accomplished here, such preservation is constitutionally sound, is in the best interests of the voting public and is in accordance with the pronouncements of this Court.

WHEREFORE, Appellees submit that the decision of the three-judge Federal Court from which this Appeal has been taken should be dismissed or in the alternative that said appeal should be affirmed in all things without plenary consideration.

Respectfully submitted,

LESLIE DUVALL,
WILLIAM H. SPARRENBERGER,
*Attorneys for Appellees Duddleston, Gallagher, Marshall and Mundy.*

SPARRENBERGER, DUVALL, TABBERT & LALLEY,
*Attorneys at Law,*
1126 Fidelity Building,
Indianapolis, Indiana 46204,
639-5444.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 26 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of The United States

October Term, 1967

No. 1263

~~ROGER D. BRANIGIN,~~
~~EDWIN M.S. STEERS,~~
~~THURMAN M. DeMOSS,~~
~~As Members of the State Election Board of Indiana,~~
JOSEPH W. SUMMERS,

*Appellants*

vs.

~~NELSON G. GRILLS,~~ DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY, ~~UNITED STATES OF AMERICA,~~

*Appellees*

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

## JURISDICTIONAL STATEMENT OF APPELLANT, JOSEPH W. SUMMERS

MARSHALL F. KIZER
309 E. Jefferson Street
Plymouth, Indiana 46563
Tel. Area Code 219
No. 936-2169

PATRICK E. CHAVIS, JR.
306 Walker Building
Indianapolis, Indiana

JOHN O. MOSS
156 E. Market Street
Indianapolis, Indiana

*Attorneys for Appellant,*
JOSEPH W. SUMMERS

C. E. Pauley & Co., Inc., Indianapolis

## INDEX


| | Page No. |
|---|---|
| I. OPINIONS BELOW (i), (ii), (iii), (iv), (v) | 2 |
| II. GROUNDS OF JURISDICTION | 2 |
| III. QUESTIONS PRESENTED | 3 |
| IV. STATEMENT OF THE CASE | 4 |
| V. FEDERAL QUESTIONS ARE SUBSTANTIAL | 7 |


## INDEX OF CASES


| | |
|---|---|
| *Reynolds v. Sims*, 84 S. Ct. 1362 | 3 |
| *Wesberry v. Sanders*, 84 S. Ct. 526 | 3 |

IN THE

# Supreme Court of The United States

October Term, 1967

No. ____

ROGER D. BRANIGIN,
EDWIN M.S. STEERS,
THURMAN M. DeMOSS,
As Members of the State Election
Board of Indiana,
JOSEPH W. SUMMERS,

*Appellants*

vs.

NELSON G. GRILLS, DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY, UNITED STATES OF AMERICA,

*Appellees*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA**

## JURISDICTIONAL STATEMENT OF APPELLANT, JOSEPH W. SUMMERS

Appellant, Joseph W. Summers, submits herewith his Jurisdictional Statement as required by Rules 13 and 15 of the Rules of the Supreme Court of the United States.

## I.

## OPINIONS BELOW

The majority opinion and the dissenting opinion of the three judge court of the United States District Court for the Southern District of Indiana are appended to this statement as Appendices B and C, respectively. The opinion of the District Court on remand is appended to this statement as Appendix A.

## II.

## GROUNDS OF JURISDICTION

(i) The original action was brought to enjoin the election of congressmen pursuant to Indiana Acts 1941, Chapter 174, giving jurisdiction to the District Court under 28 U.S.C., Sec. 1343(3) and requiring a three judge court under 28 U.S.C., Sec. 2281, and a three judge court was convened under 28 U.S.C., Sec. 2284.

(ii) The judgment of the court sought to be reviewed was entered on February 14, 1968. Notice of appeal was filed by Appellant Summers on February 23, 1968, with the Clerk of the United States District Court for the Southern District of Indiana.

(iii) The jurisdiction of the Supreme Court for this appeal is founded on 28 U.S.C., Sec. 1253, which reads as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, and interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

(iv) The cases which the appellant believes sustains the jurisdiction of the Supreme Court in this case are:

*Reynolds v. Sims*, 84 S. Ct. 1362
*Wesberry v. Sanders*, 84 S. Ct. 526

(v) The original action raised the question of the validity of Chapter 174 of the Acts of 1941 of the Indiana General Assembly and subsequently, intervening plaintiffs raised the question of the validity of Chapter 205 of the Acts of 1965 of the Indiana General Assembly; however, the validity of these Acts are not in question in this appeal.

## III.

## QUESTIONS PRESENTED

1. Whether the interim plan for eleven Congressional Districts in the State of Indiana ordered by the court for the 1968 elections, or until the Indiana legislature shall create such districts, provides districts as nearly equal in population as is practicable.

2. Whether the court, in creating eleven Congressional Districts in Indiana, violated Article I, Sec. 4 of the Constitution by usurping the power of the Indiana legislature to create Congressional Districts, in that, the court did not maintain the integrity of the districts created by Chapter 205 of the Indiana Acts of 1965 in creating the interim plan.

3. Does a Federal District Court, in creating an interim plan for the election of congressmen, have the right to deviate from the last act of the State Legislature in creating districts other than making as few changes as are necessary to bring the districts into equal population required by Article I, Sec. 2 of the Constitution of the United States?

4. Does a District Court, in devising an interim plan, have the right to disrupt a Congressional District created

by the legislature of a homogeneous group consisting of negroes and low income persons other than removing from such legislative-created district the over-population of 9,210 persons to an adjoining under-populated district?

## IV.

## STATEMENT OF THE CASE

Chapter 205 of the Acts of 1965 of the Indiana General Assembly created eleven Congressional Districts from which Representatives to the Congress of the United States would be elected. The constitutionality of this act was challenged, but upheld, in the case of *Grills v. Branigin*, 255 F. Supp. 155. Subsequently, this court in *Duddleston v. Grills* on January 9, 1967, in No. 370 in the October Term, 1966, as reported in 385 U. S. 455, 87 S. Ct. 611, vacated the judgment with the following statement:

> "The judgment is vacated and the case is remanded to the District Court for further consideration in light of *Swann v. Adams*, 385 U. S. 440, 87 S. Ct. 569; *Wesberry v. Sanders*, 376 U. S. 1, 84 S. Ct. 526 and *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362."

Thereafter, on February 7, 1967, the District Court found Chapter 205 of the 1965 Acts of the Indiana General Assembly to be unconstitutional.

The Indiana legislature was in session at the time Chapter 205 of the 1965 Acts was declared unconstitutional. The 1967 legislature was divided politically with the Democrats controlling the Senate and the Republicans controlling the House. The Indiana Senate passed a bill known as House Bill 1377, which reduced the variations from the highest to the lowest district to less than 2% compared with the 20% variation in Chapter 205 of the 1965 Acts.

The House rejected this Bill and no law was passed in the 1967 session to correct the 1965 Act which had been declared unconstitutional.

Subsequently, Congress passed Public Law 90-196 in December of 1967, which required that congressmen in Indiana be elected by districts with only one elected in each district. The 1967 legislature had adjourned in March, 1967, and was not recalled by the Governor in Special Session, as there was no indication that a plan could be agreed upon by the two houses.

The same District Court of three judges took notice of the failure of the Indiana legislature to act and called for a hearing as to whether or not it should devise an interim plan, and if so, how the districts should be created. Plans were introduced into the record with various degrees of variations depending upon the number of counties and townships that were split to bring the eleven districts to as nearly equal population as practicable. The lowest plan submitted had a variance of less than 2500 persons from the high district to the low district and made as few adjustments as necessary to readjust the 1965 Acts of the legislature to bring it into conformity to Article I, Sec. 2 of the U. S. Constitution.

All of the plans suggested to the court were rejected and a majority of the court adopted a plan with variances from the high to the low districts of 11,039 and moved over 1,200,000 persons from existing districts in devising its plan. In a dissenting opinion, Judge S. Hugh Dillin demonstrated that the eleven districts could be so created that the variance from the highest district to the lowest district would be only 211, and in the process of adjusting the districts as created by the legislature in 1965, it was only required to move 141,879 persons, thereby retaining the

heart of every district created by the 1965 legislature, and in the process splitting only 15 of the 92 counties and splitting only 4 townships of over 1,000 townships in Indiana.

Previous acts of the Indiana legislature show that town, city, township and ward boundary lines had been used in the past by the Indiana General Assembly in defining Congressional Districts.

> In Indiana Acts 1931, Chapter 113, Section 14, Page 449, the Twelfth Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as Township lines.
>
> In Indiana Acts 1935, Chapter 247, Section 1, Page 1256, the Eleventh Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as White River, incorporated towns of Woodruff Place and Beech Grove, Township and County boundary lines.
>
> In Indiana Acts 1965, Chapter 205, the Act before this Court, the legislature used township boundary lines to define the 1st, 2nd, 6th, 10th and 11th Congressional Districts, thus recognizing the fact that it is entirely proper to use township lines as boundaries of Congressional Districts rather than county lines.

In the Eleventh Congressional District created by the 1965 Act, the population consisted of 9210 persons more than the ideal district and consisted of Center and Wayne Townships of Marion County and the people in these two townships for the most part, consisted of negroes and low income persons who had elected a Representative to Congress in 1966. Instead of moving the 9210 persons to the adjoining Tenth District, which was under-populated, the court exchanged Wayne Township for Lawrence and Warren Townships of Marion County, thereby disrupting a homogeneous district created by the Indiana legislature in

1965. The Fifth District created by the Indiana Legislature was only 2,000 persons in excess of the ideal district and would have required only the moving of this many persons to the adjoining Tenth District which was underpopulated. Instead of doing this, the court created an entirely new Fifth District, retaining only approximately one-third of the persons in the original Fifth District and moving the incumbent Congressman from the Fifth District into the Fourth District with an incumbent Congressman of the opposite political faith.

## V.

## FEDERAL QUESTIONS ARE SUBSTANTIAL

The reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments for their resolution are as follows:

1. That Article I, Sec. 2 of the Constitution of the United States has been violated by the court in devising an interim plan, in that, it has not created districts of as nearly equal population as practicable, in that, the court's plan has a variance of 11,039 from the highest district to the lowest district, while a plan submitted by Appellant Summers had a variance from the highest district to the lowest district of only 2500 persons, and while the plan suggested by Judge Dillin in his dissenting opinion had a deviation from the highest district to the lowest district of only 211 persons.

2. That the court has violated Article I, Sec. 4 of the Constitution, which gives to the legislature of a state the right to create Congressional Districts; that the question of the court usurping the power of the legislative branch of government devising an interim plan is involved and the fundamental principles of the separation of powers is in-

volved, in that, the court sitting as a court of equity has no right to legislate, but only the right to equalize to bring existing districts into conformity with Article I, Sec. 2.

3. That a district Federal Court, sitting as a court in equity where a legislature had been unable to agree on Congressional Districts of equal population, does not have a right to disrupt a district created by the legislature, but has the limited power to adjust the districts by transferring population from the over-populated districts to the under-populated districts to bring all of the districts into as nearly equal population as practicable. The court does not have the right to disturb the heart of a homogeneous district created by the legislature except the making as little adjustments as are necessary to bring the districts in line with Article I, Sec. 2.

4. The question of whether or not the retention of county boundaries is superior to the creation of equal districts from which congressmen shall be elected is involved, and this is a substantial Constitutional question which should be resolved.

Appellant, Joseph W. Summers, submits that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Appellant respectfully requests Oral Argument be granted.

Respectfully submitted,
JOSEPH W. SUMMERS,
*Intervening Plaintiff and Appellant*
By _____

MARSHALL F. KIZER
309 E. Jefferson Street
Plymouth, Indiana 46563

JOHN O. MOSS
156 E. Market Street
Indianapolis, Indiana

PATRICK E. CHAVIS, JR.
306 Walker Building
Indianapolis, Indiana
*Attorneys for Appellant*

## APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NELSON G. GRILLS,
*Plaintiff,*

DOROTHY C. DUDDLESTON,
JOHN P. GALLAGHER,
MILES H. MARSHALL,
LOUIS Y. MUNDY,
JOSEPH W. SUMMERS,
*Intervening Plaintiffs,*

vs.

ROGER D. BRANIGIN,
EDWIN M. S. STEERS,
THURMAN M. DeMOSS,
As Members of the State
Election Board of Indiana,
*Defendants,*

UNITED STATES OF AMERICA,
*Intervenor.*

No. IP 64-C-101

### OPINION ON REMAND

The previous history of the above entitled action in this Court is set out in the opinion of the Court filed February 17, 1966, reported as *Grills v. Branigin,* 255 F.Supp. 155. Such previous opinion held, Judge Holder dissenting, that Chapter 205 of the Acts of 1965, enacted by the General Assembly of Indiana and reapportioning Indiana's eleven congressional districts, was constitutional within the provisions of Article 1, § 2 of the Constitution of the United States.

The intervening plaintiffs, Dorothy C. Duddleston, et al, thereafter appealed such decision to the Supreme Court of the United States. On January 9, 1967, that Court announced its opinion, *Duddelston et al v. Grills et al,* 385 U.S. —, 87 S.Ct. 611, vacating the judgment and remanding the case for further consideration in light of *Swann v. Adams,* 385 U.S. —, 87 S.Ct. 569, decided the same day, *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, and *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. No timely petition for rehearing was filed, and the mandate of the Court has now been issued.

This Court, having given further consideration to the case in the light of such mandate and of the authorities cited therein, is now of the opinion and therefore finds that said Chapter 205 of the Acts of 1965 is unconstitutional and void by reason of excessive population variances between the congressional districts therein constituted.

A fortiorari the Court further finds that Chapter 174 of the Acts of 1941, enacted by the General Assembly of Indiana and being the congressional apportionment act in existence immediately prior to the enactment of said Chapter 205 of the Acts of 1965, is likewise unconstitutional and void.

The Court takes judicial notice of the fact that Thurman M. DeMoss has replaced James E. Noland as a member of the State Election Board of Indiana, and that the said Thurman M. DeMoss, Roger D. Branigin and Edwin M. S. Steers now comprise the membership of such Board. The Court therefore, on its own motion, now substitutes the said Thurman M. DeMoss for the said James E. Noland as a party defendant herein.

The General Assembly of Indiana, now meeting in regular session, has adopted House Concurrent Resolution No.

6, and has caused a copy of the same to be forwarded to the Court in an informal manner. The resolution requests this Court to supply the General Assembly with "definitive guidelines by which said body can accurately interpret the intent of Article 1, Section 1 of the United States Constitution." We mention such resolution, despite the fact that it is not and could not properly become a part of the record in this case, as a courtesy due the legislative branch of government of the State of Indiana. We are unable to comply with the resolution for the reason that the federal courts have consistently declined to give advisory opinions since the beginning of the Republic. *Hayburn's Case*, 1796, 2 Dall. 409, 1 L.Ed. 436.

The Court takes judicial notice of the fact that elections were conducted in November, 1966, in each of the eleven congressional districts established by Chapter 205 of the Acts of 1965, and that the congressmen elected at such election were duly seated and are now serving in the Congress of the United States. Nothing herein contained should be construed as casting any doubt upon the validity of their respective elections, nor upon their right to serve out the terms for which they were elected.

In view of the findings herein made, it is considered and ordered that the defendants Roger D. Branigin, Edwin M. S. Steers and Thurman M. DeMoss, as members of the State Election Board of Indiana, and their successors in office, be, and they are hereby restrained and enjoined from conducting any further elections pursuant to said Chapter 205 of the Acts of 1965, or Chapter 174 of the Acts of 1941, or any previous Act of the General Assembly of Indiana purporting to establish districts for the election of congressmen from such State.

The Court retains jurisdiction of this action for the purpose of passing upon any future claims of unconstitution-

ality made by plaintiffs against any future congressional apportionment adopted by the General Assembly of the State of Indiana, if any, and for such other action in the premises as may be necessary.

Dated this 9 day of February, 1967.

WIN G. KNOCH
*Win G. Knoch, Judge, U. S. Circuit Court of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court*

CALE J. HOLDER
*Cale J. Holder, Judge, U. S. District Court, Designated Member of the Three-Judge Trial Court*

S. HUGH DILLIN
*S. Hugh Dillin, Judge, U. S. District Court, Assigned Trial Judge, and Member of the Three-Judge Trial Court*

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | |
|---|---|
| NELSON G. GRILLS<br>*Plaintiff,*<br>DOROTHY C. DUDDLESTON,<br>JOHN P. GALLAGHER,<br>MILES H. MARSHALL,<br>LOUIS Y. MUNDY,<br>JOSEPH W. SUMMERS,<br>*Intervening Plaintiffs,*<br>vs.<br>ROGER D. BRANIGIN,<br>EDWIN M. S. STEERS,<br>THURMAN M. DeMOSS,<br>As Members of the State Election Board of Indiana,<br>*Defendants,*<br>UNITED STATES OF AMERICA,<br>*Intervenor.* | No. IP 64-C-101 |

This action was commenced March 2, 1964 by Nelson G. Grills contesting the constitutionality of the congressional apportionment in Indiana by the Indiana General Assembly. The statute challenged was Chapter 174 of the 1941 Acts of the Indiana General Assembly.

The second phase of the action commenced with the enactment into law of Chapter 205 of the 1965 Acts of the Indiana General Assembly pending Mr. Grills' action. Chapter 205 created new congressional districts. There-

after, the intervening petitioners entered the pending action and challenged the constitutionality of the new law. This Court adjudged the intervening petitioners were wrong and upheld the constitutionality of the law. *Grills v. Branigin,* 255 F.Supp. 155. This ruling was vacated by this Court after the United States Supreme Court on January 9, 1967 remanded the case to this Court for further consideration upon the intervening petitioners appealing this Court's ruling. Duddleston et al. v. Grills et al., 385 U.S. ———————, 87 S.Ct. 611.

This Court in February of 1967 entered its judgment. Chapter 205 of the 1965 Acts of the Indiana General Assembly was held unconstitutional and void by reason of excessive population variances between the congressional districts therein constituted. Chapter 174 of the 1941 Acts of the Indiana General Assembly was also found unconstitutional and void. The defendants and their successors in office were enjoined from conducting elections pursuant to the voided Acts, or any previous Act of the Indiana General Assembly purporting to establish congressional districts for Indiana. The Court retained jurisdiction of the action for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the Indiana General Assembly, if any, and for such other action in the premises as may be necessary.

The Indiana General Assembly was in its regular session at the time of this judgment. It adjourned sine die and no congressional districting law was enacted although bills were offered, considered and failed to pass. That since the adjournment there has been no further session of said Assembly, nor has the Governor of Indiana issued any call for any special session of said Assembly, nor does he at this time intend to issue any call for any special session.

It is highly improbable that said Assembly, if called into session, could agree on any constitutional plan for dividing the State of Indiana into congressional districts. There are vacancies by reason of death and resignation of members of the said Assembly and the Governor of Indiana has not issued writs of election to fill vacancies as provided by Article 5, Section 19 of the Indiana Constitution. If a special session was called, the counties and citizens of those counties in this class action would be unrepresented in the said Assembly session in the creation of congressional districts. Without such representation, their right to petition the said Assembly in session under the Indiana Constitution is impaired and less effective than the citizens of other counties with representation in the said Assembly. It appears impossible for the State of Indiana to enact constitutional legislation creating congressional districts in time for the general election of 1968. The time table under the election laws of Indiana for the declaration of candidacy for the nomination for the office of Representative for Congress by districts provides for the filing on February 27, 1968 and within the succeeding thirty (30) days in order for such candidate to be voted upon in the primary on May 7, 1968.

This Court's Judgment of February 1967 enjoined the defendants from conducting any further elections pursuant to Chapter 205 of the 1965 Acts of the Indiana General Assembly and under any prior congressional districting law, and the Court retained jurisdiction of the action for such other action in the premises as may be necessary. The retention of jurisdiction was in accordance with the requests of the plaintiff and original intervening plaintiffs that they be given all such other, further and different remedies as the Court may deem just and necessary in the premises.

The original intervening plaintiffs first noticed the Court of the impasse in the Indiana 1968 election on November 8, 1967 and requested this Court to apportion the congressional districts. Thereafter, they filed supplemental petitions to the same effect together with a motion to advance the cause. The original intervening plaintiffs also requested that the December 14, 1967 Public Law 90-196 of the United States Congress (81 Stat. 581, 55 Stat. 761, 2 U.S.C.A. 2a) requiring Indiana to conduct elections by districts and not at large be declared unconstitutional which request is joined in by the original plaintiff. The defendants support the constitutionality of the law. The recent intervenor requests that the elections not be at large. The defendants merely seek instructions of the Court as to what modifications should be made to the void districts of Chapter 205 of the 1965 Acts of the Indiana General Assembly. The defendants do not ask this Court to apportion and do not allege they have the power to do so. The original plaintiff asks that the Court authorize the defendants to apportion Indiana.

Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly and the Election Board does not possess the legislative power under the Indiana Constitution nor does it possess judicial power under the Indiana Constitution. In the case of *Smiley v. Holm,* 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795, it was held that Article I, Section 4, Clause 1 of the United States Constitution's reference to the legislature of the several states required complete legislative treatment of a Districting Act which included the approval of the Governor. The legislature of Minnesota had passed a Districting Act which was vetoed by the

Governor of that state and the districting of the state by that Act was held not to be in compliance with the United States Constitution which specifically empowered the legislature to create districts.

It is unnecessary for the Court to reach the issue of constitutionality of Public Law 90-196 approved December 14, 1967 and the requested at large election as Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly is in force and effect and requires districting.

We find that the correct basis for the apportionment of the State of Indiana should be upon the United States Decennial Census of 1960 which is judicially noticed even though it may be a fact that the census is out dated and the communities of the state have grown disproportionately in population. The eleven (11) congressmen apportioned by Congress to the State of Indiana is based on the census conducted by the United States and not upon any other governmental or private census and cannot be changed until the next United States Census. We think the Census of 1960 must be tolerated until the next official census in order to maintain relative political stability.

The citizens of Indiana are entitled to immediate relief, and we undertake in the order to follow the apportioning of the eleven (11) congressional districts geographically among the counties and township units of government in Indiana with a minimal variance in population between such districts. The variance is so minimal that it is not deemed practicable, necessary or advisable to sever the county units except in the metropolitan counties of Lake and Marion as each have more population than would to tolerated in a district. The population of Indiana is 4,662,-498 and perfect apportionment would require a district population of 423,863. The districts apportioned have the following population and variances:

| District | Population | Pop. Variance | Per Cent Variance |
|---|---|---|---|
| 1 | 427,267 | +3,404 | +.0080 |
| 2 | 423,227 | — 636 | —.0015 |
| 3 | 418,220 | —5,643 | —.0133 |
| 4 | 423,824 | — 39 | —.00009 |
| 5 | 419,765 | —4,098 | —.0096 |
| 6 | 428,197 | +4,334 | +.0102 |
| 7 | 426,620 | +2,757 | +.0065 |
| 8 | 424,760 | + 897 | +.0021 |
| 9 | 425,360 | +1,497 | +.0035 |
| 10 | 417,158 | —6,705 | —.0158 |
| 11 | 428,100 | +4,237 | +.0099 |

The population overages of the First and Eleventh Districts total 7,641 and reduce the possibility of a perfect district for the other nine districts by 849 from 423,863 to 423,024. The gross percentage variance based on the perfect district of 423,863 population is computed from the Sixth and Tenth Districts for a total of .0260 per cent. The districts as created are compact and so far as possible follow traditional geographic and congressional districting. It was impossible to retain the composition of the previous districts intact because of the effect of the high variances from the perfect district upon other districts. For example, the Eleventh District was previously comprised of Center Township of Marion County which has a population of 333,351 and Wayne Township of Marion County which has a population of 99,722 for a total district population of 433,073 and an overage of +9,210 and a percentage of +.0217. The new Eleventh District retains Center Township, removes Wayne Township from the district and adds the less populated contiguous Townships of Lawrence and Warren in Marion County reducing the

variance to +4,237 for a percentage variance from a perfect district of +.0099.

The Court having jurisdiction of the parties and subject matter of the action,

IT IS ORDERED, ADJUDGED AND DECREED that all members of the House of Representatives of the United States Congress from the State of Indiana hereafter to be nominated and elected under the election laws of the United States and of the State of Indiana, including any special election, shall be nominated and elected from districts in accordance with Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly. This Court's Judgment of February 9, 1967, declaring Chapter 205 of the 1965 Acts of the Indiana General Assembly to be unconstitutional, was intended only to void Sections 2 through 13 of that Act and insofar as that Judgment of February 9, 1967 may be construed to void Section 1 of that Act it is hereby vacated and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the limits of each district and the territory included therein shall be as hereinafter provided until the Indiana General Assembly shall otherwise provide for districts:

First District. The Townships of Calumet, North and St. John, in the County of Lake, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the First Congressional District of the State of Indiana.

Second District. The Townships of Hobart, Ross, Hanover, Center, Winfield, West Creek, Cedar Creek and Eagle Creek, in the County of Lake, as those townships existed and their respective geographical boundaries were estab-

lished and fixed on January 1, 1965 and the Counties of Porter, LaPorte, Starke, Newton, Jasper, Pulaski, White, Tippecanoe and Benton shall be and constitute the Second Congressional District of the State of Indiana.

Third District. The Counties of St. Joseph, Elkhart, Marshall and Kosciusko shall be and constitute the Third Congressional District of the State of Indiana.

Fourth District. The Counties of LaGrange, Steuben, Noble, DeKalb, Whitley, Allen, Adams, Wells and Huntington shall be and constitute the Fourth Congressional District of the State of Indiana.

Fifth District. The Counties of Fulton, Cass, Miami, Wabash, Howard, Grant, Blackford, Clinton, Tipton, Boone, Hamilton and Carroll shall be and constitute the Fifth Congressional District of the State of Indiana.

Sixth District. The Townships of Washington, Pike, Wayne, Perry and Franklin, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965, and the Counties of Morgan, Johnson, Shelby, Rush and Hancock shall be and constitute the Sixth Congressional District of the State of Indiana.

Seventh District. The Counties of Warren, Fountain, Montgomery, Hendricks, Putnam, Parke, Vermillion, Vigo, Clay, Owen, Monroe, Greene, Sullivan, Martin and Brown shall be and constitute the Seventh Congressional District of the State of Indiana.

Eighth District. The Counties of Knox, Daviess, Gibson, Posey, Vanderburgh, Warrick, Pike, Dubois, Spencer, Perry, Crawford, Orange and Harrison shall be and constitute the Eighth Congressional District of the State of Indiana.

Ninth District. The Counties of Floyd, Clark, Washington, Lawrence, Jackson, Bartholomew, Jennings, Scott, Jefferson, Switzerland, Ohio, Dearborn, Ripley, Franklin, Fayette and Decatur shall be and constitute the Ninth Congressional District of the State of Indiana.

Tenth District. The Counties of Madison, Delaware, Randolph, Wayne, Henry, Jay and Union shall be and constitute the Tenth Congressional District of the State of Indiana.

Eleventh District. The Townships of Center, Warren and Lawrence, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the Eleventh Congressional District of the State of Indiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, the Secretary of State of the State of Indiana and all election officials of the State of Indiana under the Election Code of Indiana are mandated to conduct all primary, general and special elections for the office of Representative to the United States Congress in accordance with this judgment in the districts created by this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, the Secretary of State of the State of Indiana and all election officials of the State of Indiana under the Election Code of Indiana be and they are hereby enjoined from conducting any primary, general and special elections for the office of Representative to the United States Congress by the use of districts other than those created by this judgment and by the use of an at large district.

The dissent of our colleague inadvertently would sacri-

fice factors of judicial apportionment and include factors prevalent in a legislative apportionment which include objectives of retention or elimination of incumbent congressmen, splitting counties of one political hue or another, and other considerations inherent in the unconstitutional 1965 legislative apportionment which was accomplished by that Act.

The majority's apportioned districts achieve the requirements of equality laid down in the Supreme Court Decisions without doing unnecessary violence to the heart of traditional districts, county lines and township lines, including the 1965 Act. Chapter 205 of the 1965 Act of the Indiana General Assembly created only two (2) of the eleven (11) districts within tolerable limits of population. The other nine (9) districts were grossly violative of the tolerable limits of population and necessitated changes. The 1965 Act made gross population shifts from the previous districts established in the 1941 session of the Indiana General Assembly. Some of the districts created by the 1965 Act were not compact. The 1965 Act divided the homogeneous Counties of Floyd and Clark and placed them into two (2) separate districts and the same occurred with respect to the Counties of Elkhart and St. Joseph. A new legislature has been elected since the 1965 legislature and in their regular session they failed to agree that simple adjustments could be made to the districts created by the 1965 Act of the previous legislature. The present unconstitutional districts of 1965 are not sacrosanct, nor are they steeped in tradition. The United States Census of Population for 1960 presents the additional information that there are nine (9) Metropolitan Statistical Areas. They are the adjoining Counties of Clark and Floyd area, the Vanderburgh County area, Vigo County area, Marion County area, Delaware County area, Lake County area, Porter County

area, St. Joseph County area, and the Fort Wayne County area. The Lake and Marion County areas respectively contain substantial population in excess of a would be perfect district and must be and are divided. The practical effect of these metropolitan centers of population and their homogeneous influence is that they will be and are the heart of any plan of districting.

We have considered the many prior patterns of legislative districts in Indiana which were established in times when the General Assembly of Indiana was not faced with the fundamentals that are now factors of districting. The traditional heart of every district is retained by this Court's districts, however the accretions and separation of some counties from some districts is necessary to meet the present day factors. For example, the Third District as created by the 1941 Act of the Indiana General Assembly was composed of the Counties of LaPorte, St. Joseph, Elkhart and Marshall. In the 1965 session of the Indiana General Assembly, the Third District was composed of the Counties of LaPorte, St. Joseph, Marshall and Starke with a total population based on the 1960 Census of 384,079 or 39,784 less population than a would be perfect district of 423,863 which was not tolerable. This Court's Third District uses the traditional three (3) Counties of St. Joseph, Elkhart and Marshall and adds the County of Kosciusko. Kosciusko County was a part of the Second District and of necessity had to be separated from the Second District with its accretion of Hobart Township in Lake County and such separation contributes to the compactness of both the Second and Third Districts as constituted by this Court.

The Court does not have the simple facts before it that were present in the case of *Klahr v. Goddard*, 250 F.Supp. 537 (D.C. Ariz. 1966).

The Arizona Three-Judge District Court merely readjusted the formerly unequal legislatively created congressional districts without disturbing the boundary of one (1) apportioned district, which is wholly unlike the facts before us. The Court there was dealing only with the three (3) congressional legislative created districts of Arizona. District Two was near perfect and Districts One and Three were adjacent to each other. The Court found that because the latter two (2) districts were "adjacent to each other, it is feasible to adjust the malapportionment between such two districts by moving a portion of Maricopa County, which is District No. 1, into and making the same a part of District No. 3". In Indiana, the Court is faced with a far different situation wherein only two (2) of the state's eleven (11) congressional districts as heretofore constituted where within constitutionally tolerable population limits. (Districts Five and Nine.) The other nine (9) were not within such limits, and, of course, could not all be adjacent to one another. Thus, the Court is faced with a far different problem than merely shifting one (1) county between two (2) adjacent districts. In addition, a new legislature was convened and refused to accept the pattern of the 1965 districting. The adjustments of the 1965 pattern of non-compact districts required the substantial deletion of population from the following districts:

First District overage from perfect district of +30,345
Second District overage from perfect district of + 7,201
Fourth District overage from perfect district of +27,074
Sixth District overage from perfect district of +15,098
Eighth District overage from perfect district of +19,389
Eleventh District overage from perfect district of + 9,210

and the substantial addition of population to the following districts:

Third District underage from perfect district of —39,784
Seventh District underage from perfect district of —54,200
Tenth District underage from perfect district of —17,645

The results of necessarily moving approximately 27,000 population out of the First District as established in 1965 to the Second District (and there was no other place they could go) with an overage of approximately 7000 population as established in 1965 makes the Second District with an overage of approximately 33,000 population and some population had to be removed therefrom to another. The problem was multiplied nine (9) times as the above underages and overages of the 1965 districts disclose. The net result of developing the districts is similar to the example of the domino game when one (1) standing domino falls many more are affected by the tumbling domino. In addition counties are not composed of uniform population and vary greatly.

We cannot agree with our colleague in dissent in his attempted adherence to the 1965 pattern of districts. The majority chooses to adhere to the traditional heart of the districting pattern of Indiana insofar as it is reasonable and effect practical homogeneous compactness and as related to the Metropolitan Statistical Areas of the 1960 Census. Any other consideration includes the forbidden factor of entering the political thicket of which Justice Frankfurter warned in the case of *Colegrove v. Green*, 66 S.Ct. 1198, 328 U.S. 549, 90 L.Ed. 1432 (1946). Unlike the unconstitutional apportionment of the 1965 Act of the Indiana General Assembly, the majority's apportionment does not pit an incumbent congressman against another of the same political party and does not indulge in grotesque geographical alignment of counties to accomplish such a result. The unplanned results of the majority's districts

which adhere to Indiana's historical patterns, tolerable population variances and compactness of a judicial apportionment has resulted in the avoidance of such inference in that no incumbent congressman is pitted against another of the same political party and in only one (1) instance is an incumbent congressman of one (1) party pitted against another of the opposite party. The majority believes Indiana will be best served with the compactness of the districts created.

The dissent's reference to the summary total of the relocated population of all of the eleven (11) districts of the majority's districting is eye catching but is not based upon any constitutional or legal principal anymore than the summary of the total variances of the eleven (11) districts from a perfect district would be. No legislative apportionment has been rendered unconstitutional by the addition of the variances of all districts in a state, nor by the relocation of population. The statistics of necessary population shifts are further exampled by the absolute necessity of moving the entire population of Hobart Township in Lake County (consisting of 39,223) out of the First District into the Second District as created by the 1965 Act of the Indiana General Assembly and moving the entire population of St. John Township of Lake County (consisting of 12,282) out of the Second District into the First District for a total population change of 51,505 to rehabilitate the invalid apportioned First District. This overloaded the Second District by approximately 33,000 population (now we have approximately 84,505 relocations) and it was surrounded by the Third and Seventh Districts with substantial underages in population totaling 93,984; the Fourth District with an overage of 27,074; the Fifth District with an overage of 2,245; and the Sixth District with an overage of 15,098. What county or counties from

the perimeter of the Second District containing 33,000 population can be moved to the Third or Seventh Districts? We found no such simple solution. Bordering these districts a similar problem existed. Another example is the Eleventh District as created in 1965 with an overage in population of 9,210 and to diminish this overage one of two (2) townships (Wayne containing 99,722) of the two (2) township districts had to be moved to another district. Hence the computation of relocated population is of no legal significance. The 1965 legislative apportionment was conceived in violation of the law, the districts were so grossly apportioned and so geographically grotesque, that the argument of relocation of population is laid upon an unsound base.

Dated this 14th day of February, 1968.

WIN G. KNOCH

*Win G. Knoch, Judge, U. S. Circuit Court of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court*

CALE J. HOLDER

*Cale J. Holder, Judge, U. S. District Court, Designated Member of the Three-Judge Trial Court*

[Irrelevant detail shown on the Court's map omitted from this copy.]

**INDIANA 1960 CENSUS POPULATION 4,662,498**
**PERFECT APPORTIONED DISTRICT POP. 423,863**

FIRST DISTRICT IS COMPOSED OF CALUMET TOWNSHIP, NORTH TOWNSHIP, ST. JOHN TOWNSHIP OF LAKE COUNTY.

ELEVENTH DISTRICT IS COMPOSED OF CENTER TOWNSHIP, WARREN TOWNSHIP, LAWRENCE TOWNSHIP OF MARION COUNTY.

SIXTH DISTRICT INCLUDES WASHINGTON TOWNSHIP, PIKE TOWNSHIP, WAYNE TOWNSHIP, DECATUR TOWNSHIP, PERRY TOWNSHIP, FRANKLIN TOWNSHIP OF MARION COUNTY.

| Dist. | Pop. | Perfect Dist. Pop. Variance | Percentage Pop. Variance |
|---|---|---|---|
| 1 | 427,267 | 3,404+ | .0080+ |
| 2 | 423,227 | 636— | .0015— |
| 3 | 418,220 | 5,643— | .0133— |
| 4 | 423,824 | 39— | .00009— |
| 5 | 419,765 | 4,098— | .0096— |
| 6 | 428,197 | 4,334+ | .0102+ |
| 7 | 426,620 | 2,757+ | .0065+ |
| 8 | 424,760 | 897+ | .0021+ |
| 9 | 425,360 | 1,497+ | .0035+ |
| 10 | 417,158 | 6,705— | .0158— |
| 11 | 428,100 | 4,237+ | .0099+ |

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NELSON G. GRILLS,
*Plaintiff,*
DOROTHY C. DUDDLESTON,
JOHN P. GALLAGHER,
MILES H. MARSHALL,
LOUIS Y. MUNDY,
JOSEPH W. SUMMERS,
*Intervening Plaintiffs,*
vs.
ROGER D. BRANIGIN,
EDWIN M. S. STEERS,
THURMAN M. DeMOSS,
As Members of the State Election Board of Indiana,
*Defendants,*
UNITED STATES OF AMERICA,
*Intervenor.*

No. IP 64-C-101

### CORRECTED AND SUPERSEDING DISSENTING OPINION

I respectfully dissent from so much of the majority opinion as purports to mandate the defendant members of the State Election Board of Indiana, and others not parties to this action, to conduct elections for the office of representative in the Congress of the United States from the State of Indiana from eleven districts created by them. I agree that the defendants should be instructed as to how such elections should be conducted, in accordance with

their prayer, and I further agree that this court has jurisdiction to, and should do so. It is not, however, constitutionally permissible for this court to enter the political arena as the majority has done, and to impose upon the powers of a coordinate political department, the General Assembly of Indiana, by adopting a districting scheme of its own devising, bearing no reasonable relationship to the plan last adopted by the General Assembly.[1]

The plain error into which the majority has fallen is that it has misconceived the failure of the politically divided General Assembly to enact a new districting plan to have somehow given carte blanche to this court, or to a majority thereof, to usurp all legislative prerogatives, and to attack the problem as if Chapter 205 of the Acts of 1965 (hereafter "Chapter 205"), had never been enacted. But such is not the law. On the contrary, all courts which have spoken on the subject have unanimously held that the judicial power is limited to reviewing the last (albeit unconstitutional) legislative act, and to making such corrections as are *necessary* to bring it into conformity with

---

[1] "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 1962, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed. 2d 663, 686.

the "one man, one vote" principle.[2] This must be so, since it has long been the law that the courts have no power to perform administrative acts.[3]

I now consider the plan of the majority, to determine whether it exceeds the bounds of necessity. According to the districting adopted by Chapter 205, three districts contained less than the optimum population of 423,863, by a total of 111,629 persons;[4] the other eight districts therefore had a similar total overage. It is apparent that if available census information is sufficiently detailed in its "building blocks" to enable the transfer of 111,629 persons from the eight larger districts to the three smaller districts in proper ratio, all districts may thus be made to conform completely to constitutional commandments. But the majority plan moves a total of 1,215,606 persons from districts created by Chapter 205 to other districts![5] This gross deviation of more than 1,000 per cent demonstrates beyond a doubt that the majority plan is not an objective one of necessary correction, but rather is an original and novel plan conforming only to the subjective impulses of the majority.

It is true that the majority, after juggling approximately one-fourth of the total population of the State, has created eleven districts more balanced in population than those

---

[2] Maryland Committee for Fair Cong. Redist. v. Tawes, D. Md., 1966, 253 F.Supp. 731, aff'd sub nom. Alton v. Tawes, 384 U.S. 315, 16 L.Ed.2d 586; Klahr v. Goddard, D. Ariz., 1966, 250 F.Supp. 537; People v. Kerner, 1965, 33 Ill.2d 460, 211 N.E.2d 736.

[3] O'Donoghue v. United States, 1933, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356; Old Colony Trust Company v. Commissioner of Internal Revenue, 1929, 279 U.S. 716, 49 S.Ct. 499, 73 L.Ed. 918.

[4] Table I, Appendix.

[5] Table II, Appendix.

created by Chapter 205. But to do this, they have impermissibly taken what I shall call the "chain reaction" approach. Using this method, they have moved whole counties from districts already in close balance as created by Chapter 205 to other districts already overpopulated. This, of course, magnifies the problem already existing in the overpopulated districts, and requires the majority to remove from such districts more population than would have been required in the first instance. This goes on in chain reaction form until the aforementioned total of 1,215,606 people and 26 out of 92 whole counties have been rearranged. As an example, the 5th District, as created by Chapter 205, was overpopulated by only 2,247 persons; to correct this district to perfection, therefore, would have required only that 2,247 persons be moved to an adjoining, underpopulated district, such as the 10th, and that no population be added. But the majority has completely reconstituted the 5th District by moving out of it the whole counties of Adams, Wells, Jay, Madison and Huntington,[6] and by moving into it the counties of Wabash, Fulton, Carroll, Cass, Clinton, Boone, Tipton and Hamilton. Of the original Chapter 205 district, only the counties of Miami, Howard, Grant and Blackford (total population 198,042) remain constant!

The census figures are in sufficient detail to enable a court to correct the districting adopted by Chapter 205 to within approximately 100 votes per district, and in fact I have done so.[7] My corrected plan has a maximum deviation of plus 118 in the 4th District and minus 93 in the 2d District. The ratio of the largest to the smallest district in terms of population may thus be computed as 1.00056 to 1.

---

[6] Map attached to Table II, Appendix.

[7] Table III, Appendix.

Of equal importance, all corrections have been made in a constitutional rather than a random fashion in that the shifts invariably go from overpopulated districts to underpopulated districts, with one unavoidable exception, so as to disturb Chapter 205 boundaries by the absolute minimum.

In accomplishing this result, I of course commence with the districts as laid out by Chapter 205.[8] The 1st District is overpopulated by 30,345, and must be corrected by the removal of approximately this number. The 1st District is contiguous only to the 2d District, so that the movement must be to that district, although it is already overpopulated by 7,201. This is the one unavoidable exception referred to in the preceding paragraph, wherein population is moved into an already overpopulated district. It is for this reason that it must be corrected first. By inspection of the census tracts and enumeration districts in the 1st District, I find a bloc of 30,297 persons in a geographic area contiguous to the 2d District,[9] and correct the 1st District by moving such bloc to the 2d District, which now becomes overpopulated by a total of 37,498. All further movements will be direct from overpopulated to underpopulated districts.

The 2d District adjoins two underpopulated districts, the 3d and the 7th. Looking ahead, we perceive that the 4th

---

[8] Map attached to Table I, Appendix.

[9] The geographic area is in the southern part of Hobart Township, as follows: Census Tract HOT 56, population 16,934; Census Tract HOT 58, population 8,752; Census Enumeration Districts 16-N, 16-P, and East Gary 2, 3, 7 and 8 in Census Tract HOT 57, total population 4,611. (Metes and bounds descriptions set out in Table IV, Part 2, for areas other than counties and townships).

District is overpopulated, and adjoins the overpopulated 2d, 5th and the underpopulated 3d. The 4th may, therefore, only move its surplus into the 3d, whereas the 2d may move either to the 3d or to the 7th. We therefore first correct the 4th, by moving an area in Elkhart County,[10] population 26,956, into the 3d. The 3d is still underpopulated, so we correct it completely and correct the 2d in part by moving townships in Porter, Jasper, Pulaski and Fulton Counties,[11] population 12,760, into the 3d. We now complete the correction of the 2d by moving townships in Benton and Tippecanoe Counties,[12] population 24,831, into the 7th. Correction of the 7th is continued, and at the same time the 8th is corrected completely by moving Martin County and townships off of the north part of Knox County,[13] total population 19,277, from the 8th to the 7th. Correction of the 7th is completed by the transfer to it of certain townships of Hendricks and Morgan Counties,[14] population 10,196, from the overpopulated 6th. Correction of the 6th is completed by transfer of a population of 4,921 out of

---

[10] Cleveland and Baugo Townships, combined population 7,206, and Census Enumeration Districts 8-N, 9-N, 10-19, inclusive, 29, 34, 35, 36 and 38-N, all in Concord Township in the City of Elkhart, containing a population of 19,750.

[11] For townships see Table III.

[12] All of Benton County, except Union Township thereof, population 11,372; Townships of Jackson, Lauramie, Randolph, Sheffield, Shelby, Union, Wayne and Wea of Tippecanoe County, total population 13,459.

[13] Widner, Vigo and Steen Townships.

[14] Franklin and Clay Townships of Hendricks County, total population 2,977; Adams, Ashland, Clay, Gregg and Jefferson Townships of Morgan County, total population 7,219.

Warren Township of Marion County[15] to the underpopulated 10th. Finally, the 5th,[16] 9th,[17] and 11th[18] are each corrected by transfers into the 10th, which is finally corrected thereby.

The corrections above set out are the only proper ones. It is immaterial whether the adjustments are made in the precise order in which I have listed them for illustrative purposes, or in some other order. It is required that the 1st District be adjusted first, to avoid impermissible and unnecessary "chain reaction" transfers. But once this correction is made, it is absolutely immaterial whether the next district adjusted is the 8th, the 11th, the 5th, or any other district. If the rule of avoiding unnecessary transfers is observed, the results must be the same.[19]

The majority adopts the argument found wanting on the

---

[15] The geographic area transferred is a part of Warren Township of Marion County, being Census Enumeration Districts 137-P, 138-P, 138-R, 427, 428-N, 428-Pa and 428-Pb, all in Census Tract 601, and containing a total population of 4,921.

[16] Jackson Township of Blackford County, population 1,527, and Union Township of Howard County, population 769.

[17] Fugit Township of Decatur County, population 1,071.

[18] The geographic area transferred is a part of Center Township of Marion County, contained in Census Tract 506, Census Enumeration District 194 of Census Tract 523, and Census Enumeration District 123 of Census Tract 507, containing a total population of 9,274.

[19] e.g., Assume starting with the overpopulated 8th: the transfer must be to the 7th, because the other adjacent district, the 9th, is also overpopulated; the only underpopulated district touched by the overpopulated 5th and 11th is the 10th, so their transfers must be to it, etc.

first appeal of this case,[20] to the effect that their new plan is better than the one it would supersede. But they can not prevail on this basis, as their maximum variance between overpopulated and underpopulated districts is 11,039—or approximately fifty times higher than my variance of 235. However, I do not argue the numbers game; I simply point out the figures. They attempt the further justification that they do not split counties. But there is nothing sacred about a county, or for that matter a township or a city. These political subdivisions of the State exist purely for its convenience for the purpose of assessing and collecting ad valorem taxes, and performing various administrative chores. The constitutionality of splitting political subdivisions has been established by the decision of the Supreme Court of the United States affirming such a plan;[21] hence the excuse advanced by the majority for their plan is not a satisfactory explanation for their curious moving from district to district of approximately 25 per cent of the population of the State.

I must therefore dissent from that which I firmly believe to be the unconstitutional assumption of a power vested exclusively in the General Assembly by Article 1, Section 4 of the Constitution by a court which further lacks the jurisdiction to do so by reason of the limited powers granted to it by Article 3, Section 2 of the Constitution. The action of the majority is thus doubly unconstitutional, if such a thing be possible.

My dissenting opinion, filed February 14, 1968, contained

---

[20] Duddleston v. Grills, 385 U.S. 455, vacating and remanding Grills v. Branigin, S.D. Ind., 1966, 255 F.Supp. 155; cf. Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569.

[21] Alton v. Tawes, 384 U.S. 315, 16 L.Ed.2d 586, affirming Maryland Committee for Fair Cong. Redist. v. Tawes, D. Md., 1966, 253 F.Supp. 731.

an error in my suggested correction of the 3d District. I have therefore revised the townships to be transferred from the 2d to the 3d District, and the appropriate tables. The corrected opinion is republished in its entirety, in the interest of clarity, and therefore supersedes completely the original opinion.

Dated this 26th day of February, 1968.

S. HUGH DILLIN

*S. Hugh Dillin, Judge, U. S. District Court, Assigned Trial Judge, and Member of the Three-Judge Trial Court.*

## APPENDIX

[Containing Table I (with map), Table II (with map), Table III (with map), and Table IV, Parts 1 and 2]

## TABLE I

SHOWING POPULATIONS OF THE VARIOUS CONGRESSIONAL DISTRICTS OF INDIANA AS ESTABLISHED BY CHAPTER 205, ACTS OF THE INDIANA GENERAL ASSEMBLY OF 1965, AND VARIANCES THEREIN

| District | Population | Variance from Average Overpopulated | Underpopulated |
|---|---|---|---|
| 1 | 454,208 | + 30,345 | |
| 2 | 431,064 | + 7,201 | |
| 3 | 384,079 | | — 39,784 |
| 4 | 450,937 | + 27,074 | |
| 5 | 426,110 | + 2,247 | |
| 6 | 438,961 | + 15,098 | |
| 7 | 369,663 | | — 54,200 |
| 8 | 443,252 | + 19,389 | |
| 9 | 424,933 | + 1,070 | |
| 10 | 406,218 | | — 17,645 |
| 11 | 433,073 | + 9,210 | |
| | 4,662,498 | +111,634 | —111,629 |

## NOTES

1. Total Population, 1960 Census = 4,662,498.

2. Ideal District Population = 4,662,498/11 = 423,863. (Since the indicated division leaves a remainder of 5, the overpopulated district total population exceeds that of the underpopulated total by this amount.)

3. Configuration of Districts is as shown graphically on attached outline map. All Districts contain complete counties, as indicated, except as follows:

(a) The 1st District consists solely of North, Calumet, and Hobart Townships of Lake County.

(b) The 2d District consists of complete counties as indicated on the map, plus all of Lake County except North, Calumet, and Hobart Townships.

(c) The 6th District consists of complete counties as indicated on the map, plus Pike, Washington, Decatur, Perry, Franklin, and Warren Townships of Marion County.

(d) The 10th District consists of complete counties as indicated on the map, plus Lawrence Township of Marion County.

(e) The 11th District consists solely of Center and Wayne Townships of Marion County.

Indiana
Congressional
Districts
(Ch. 205, 1965 Acts).

County population
figures per
1960 census.

Note: Marion
& Lake County
figures broken
down into
various parts
(as indicated).

[Irrelevant detail on Judge Dillin's map has been omitted from this copy.]

## TABLE II

SHOWING COUNTIES AND PARTS OF COUNTIES SHIFTED BY THE MAJORITY REDISTRICTING PLAN FROM ONE CHAPTER 205 DISTRICT TO ANOTHER, THE RESPECTIVE POPULATIONS THEREOF, AND THE POPULATION AMOUNTS REQUIRED TO HAVE BEEN MOVED TO HAVE ACHIEVED NECESSARY CORRECTIONS TO THE DISTRICTING PLAN CONTAINED IN CHAPTER 205, ACTS OF THE 1965 GENERAL ASSEMBLY OF INDIANA

| District Number | Area Removed From District | District To Which Transferred | 1960 Population Of Area Removed | Number Necessary To Have Been Reduced To Achieve Population Of 423,863 |
|---|---|---|---|---|
| 1 | Hobart Twp. of Lake County | 2 | 39,223 | 30,345 |
| 2 | St. Johns Twp. of Lake County | 1 | 12,282 | |
| | Kosciusko County | 3 | 40,373 | |
| | Wabash County | 5 | 32,605 | 37,546[1] |
| | Cass County | 5 | 40,931 | |
| | Fulton County | 5 | 16,957 | |
| | Carroll County | 5 | 16,934 | |
| 3 | LaPorte County | 2 | 95,111 | |
| | Starke County | 2 | 17,911 | 0 |
| 4 | Elkhart County | 3 | 106,790 | 27,074 |
| 5 | Huntington County | 4 | 33,814 | |
| | Wells County | 4 | 21,220 | |
| | Adams County | 4 | 24,643 | 2,247 |
| | Jay County | 10 | 22,572 | |
| | Madison County | 10 | 125,819 | |
| 6 | Clinton County | 5 | 30,765 | |
| | Boone County | 5 | 27,543 | |
| | Montgomery County | 7 | 32,089 | 15,098 |
| | Hendricks County | 7 | 40,896 | |
| | Warren Twp. of Marion County | 11 | 60,344 | |

## TABLE II (Continued)

| District Number | Area Removed From District | District To Which Transferred | 1960 Population Of Area Removed | Number Necessary To Have Been Reduced To Achieve Population Of 423,863 |
|---|---|---|---|---|
| 7 | Daviess County | 8 | 26,636 | 0 |
| 8 | Martin County | 7 | 10,608 | |
| | Floyd County | 9 | 51,397 | 19,389 |
| 9 | Orange County | 8 | 16,877 | |
| | Shelby County | 6 | 34,093 | 1,070 |
| 10 | Tipton County | 5 | 15,856 | |
| | Hamilton County | 5 | 40,132 | |
| | Hancock County | 6 | 26,665 | |
| | Rush County | 6 | 20,393 | |
| | Lawrence Twp. of Marion County | 11 | 34,405 | 0 |
| 11 | Wayne Twp. of Marion County | 6 | 99,722 | 9,210 |
| | | Totals | 1,215,606 | 141,979[2] |

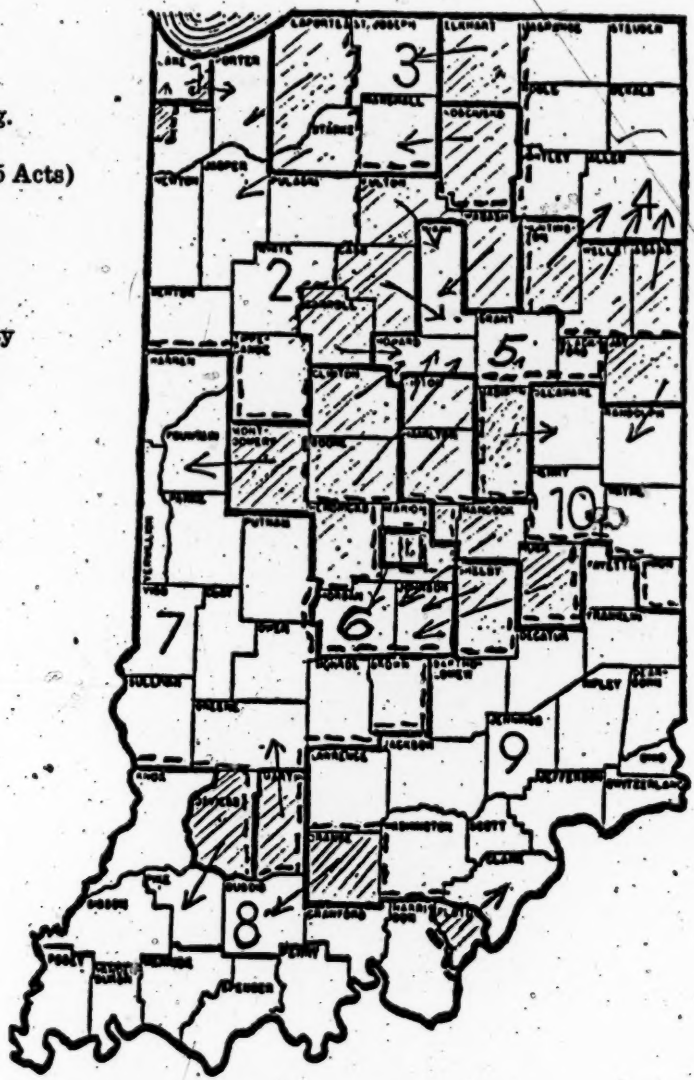
[1, 2] Include the 30,345 transferred by necessity from the overpopulated 1st District to the overpopulated 2d District, thus requiring a retransfer out of the 2d District.

Note: A map showing the congressional district lines established by Chapter 205, and also the lines established by the majority of this court is attached hereto.

Indiana Cong. Districts per Ch. 205 (1965 Acts) shown by solid lines.

Districts as arranged by court majority shown by broken lines.

Counties moved by court are shaded.




[Irrelevant detail on Judge Dillin's map has been omitted from this copy.]

## TABLE III

SHOWING THE PARTS OF COUNTIES (INCLUDING ONE COMPLETE COUNTY) SHIFTED BY MY CONSTITUTIONAL CORRECTIONAL PLAN FROM ONE CHAPTER 205 DISTRICT TO ANOTHER, THE RESPECTIVE POPULATIONS THEREOF, AND THE POPULATION AMOUNTS REQUIRED TO HAVE BEEN MOVED TO HAVE ACHIEVED NECESSARY CORRECTIONS TO THE DISTRICTING PLAN CONTAINED IN CHAPTER 205, ACTS OF THE 1965 GENERAL ASSEMBLY OF INDIANA

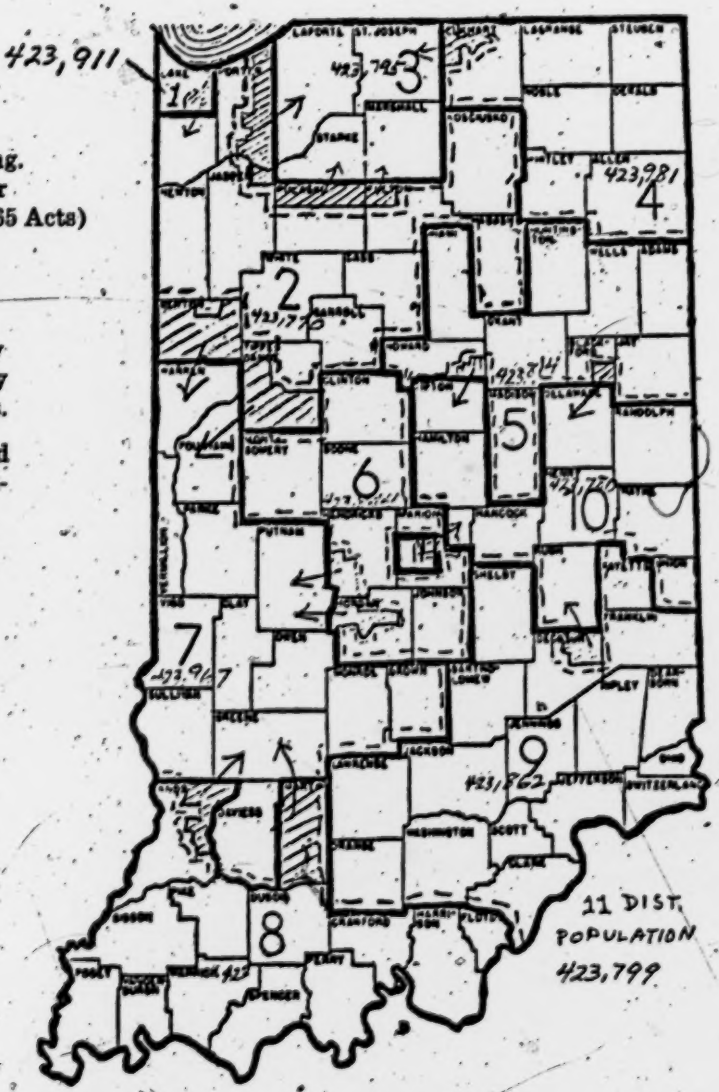
| District Number | Area Removed From District | District To Which Transferred | 1960 Population Of Area Removed | Number Necessary To Have Been Reduced To Achieve Population of 423,863 |
|---|---|---|---|---|
| 1 | Part of Hobart Twp. of Lake County (Table IV, Part 2) | 2 | 30,297 | 30,345 |
| 2 | Jackson, Morgan, Pine, Pleasant and Washington Twps. of Porter County | 3 | 8,034 | |
| | Kankakeee Twp. of Jasper County | 3 | 576 | |
| | Cass, Franklin, Rich Grove and Tippecanoe Twps. of Pulaski County | 3 | 3,141 | 37,498[1] |
| | Aubbeenaubbee Twp. of Fulton County | 3 | 1,009 | |
| | Jackson, Lauramie, Randolph, Sheffield, Shelby, Union, Wayne, and Wea Twps. of Tippecanoe County | 7 | 13,459 | |
| | Benton County, except Union Twp. of such county | 7 | 11,372 | |
| 3 | Underpopulated District, | | | |

| District Number | Area Removed From District | District To Which Transferred | 1960 Population Of Area Removed | Number Necessary To Have Been Reduced To Achieve Population of 423,863 |
|---|---|---|---|---|
| | No Chapter 205 area moved out | | 0 | 0 |
| 4 | Baugo and Cleveland Twps. of Elkhart County | 3 | 7,206 | |
| | Part of Concord Twp. of Elkhart County (Table IV, Part 2) | 3 | 19,750 | 27,074 |
| 5 | Jackson Twp. of Blackford County | 10 | 1,527 | 2,247 |
| | Union Twp. of Howard County | 10 | 769 | |
| 6 | Part of Warren Twp. of Marion County (Table IV, Part 2) | 10 | 4,921 | |
| | Franklin and Clay Twps. of Hendricks County | 7 | 2,977 | 15,098 |
| | Adams, Ashland, Clay, Gregg and Jefferson Twps. of Morgan County | 7 | 7,219 | |
| 7 | Underpopulated District, No Chapter 205 area moved out | | 0 | 0 |
| 8 | Martin County | 7 | 10,608 | |
| | Widner, Vigo and Steen Twps. of Knox County | 7 | 8,669 | 19,389 |
| 9 | Fugit Twp. of Decatur County | 10 | 1,071 | 1,070 |
| 10 | Underpopulated District, No Chapter 205 area moved out | | 0 | 0 |
| 11 | Part of Center Twp. of Marion County (Table IV, Part 2) | 10 | 9,274 | 9,210 |
| | | Totals | 141,879 | 141,931[2] |

1, 2 Include the 30,297 transferred by necessity from the overpopulated 1st District to the overpopulated 2d District, thus requiring a retransfer out of the 2d District.

Notes: 1. Where Table IV, Part 2 is referred to in the above summary, the metes and bounds descriptions of areas transferred which do not follow county or township lines are set out in full in the written description of corrected districts contained in such table.

2. A map showing the congressional district lines established by Chapter 205 and also the necessary corrections thereto made by myself is attached hereto.




Indiana Cong. Districts per Ch. 205 (1965 Acts) shown by solid lines.

Districts as corrected by me shown by broken lines.

Areas moved to effect constitutional population balance are shaded.

Population figures are of districts corrected.

[Irrelevant detail on Judge Dillin's map has been omitted from this copy.]

TABLE IV—PART 1

SHOWING POPULATIONS OF THE VARIOUS CONGRESSIONAL DISTRICTS OF INDIANA AS ESTABLISHED BY CHAPTER 205, ACTS OF THE INDIANA GENERAL ASSEMBLY OF 1965, AS CORRECTED IN A CONSTITUTIONAL MANNER

| District | Population | Variance from Average | |
|---|---|---|---|
| | | Overpopulated | Underpopulated |
| 1 | 423,911 | + 48 | |
| 2 | 423,770 | | — 93 |
| 3 | 423,795 | | — 68 |
| 4 | 423,981 | +118 | |
| 5 | 423,814 | | — 49 |
| 6 | 423,844 | | — 19 |
| 7 | 423,967 | +104 | |
| 8 | 423,975 | +112 | |
| 9 | 423,862 | | — 1 |
| 10 | 423,780 | | — 83 |
| 11 | 423,799 | | — 64 |
| | 4,662,498 | +382 | —377 |

**NOTES**

1. Total Population, 1960 Census = 4,662,498

2. Ideal District Population = 4,662,498/11 = 423,863

(Since the indicated division leaves a remainder of 5, the over-populated district total population exceeds that of the under-populated total by this amount.)

## TABLE IV—PART 2

## SETTING OUT THE DESCRIPTIONS OF THE VARIOUS ELEVEN CONGRESSIONAL DISTRICTS IN INDIANA AS CORRECTED IN A CONSTITUTIONALLY PERMISSIBLE MANNER

### FIRST DISTRICT

Calumet, North and Hobart Townships of Lake County, save and except a part of said Hobart Township more particularly described by metes and bounds as follows: Beginning at the southwest corner of said township, and running thence north to 29th Avenue, thence running east to Deep River, thence in an easterly direction, along and with said Deep River to Grand Boulevard, thence north to the right of way to the Michigan Central Railroad, thence in a northeasterly direction along and with said railroad to Union Street, thence south to Central Avenue, thence east to the township line, thence south along said township line to the southeast corner of said Hobart Township, thence west to the place of beginning.

### SECOND DISTRICT

The counties of Carroll, Cass, Kosciusko, Newton, Wabash and White; also, that part of Hobart Township of Lake County described as follows: Beginning at the southwest corner of said township, and running thence north to 29th Avenue, thence running east to Deep River, thence in an easterly direction, along and with said Deep River to Grand Boulevard, thence north to the right of way to the Michigan Central Railroad, thence in a northeasterly direction along and with said railroad to Union Street, thence south to Central Avenue, thence east to the township line, thence south along said township line to the southeast

corner of said Hobart Township, thence west to the place of beginning; also, the townships of Cedar Creek, Center, Eagle Creek, Hanover, Ross, St. John, West Creek, and Winfield in Lake County; also, the townships of Boone, Center, Liberty, Portage, Porter, Union and Westchester in Porter County; also, Union Township in Benton County; also, the townships of Fairfield, Perry, Tippecanoe, Wabash and Washington in Tippecanoe County; also, the townships of Barkley, Carpenter, Gillam, Hanging Grove, Jordan, Keener, Marion, Milroy, Newton, Union, Walker, and Wheatfield in Jasper County; also, the townships of Beaver, Harrison, Indian Creek, Jefferson, Monroe, Salem, Van Buren, and White Post in Pulaski County; also, the townships of Henry, Liberty, Newcastle, Richland, Rochester, Union and Wayne in Fulton County.

## THIRD DISTRICT

The counties of LaPorte, Marshall, Starke, and St. Joseph; also, Baugo and Cleveland Townships in Elkhart County; also, a part of Concord Township in Elkhart County described as follows: All that part of the City of Elkhart lying in Concord Township and being north of the right of way of the New York Central Railroad Company, and also a part thereof beginning at the intersection of Oakland Avenue and the right of way of the said New York Central Railroad Company, and running northeasterly along and with said right of way to South Main Street, thence southeasterly along and with said street to Hickory Street, thence southwesterly along and with Hickory Street to South 6th Street, thence south to West Indiana Avenue, thence east to Benham Avenue, thence south to Wolf Avenue, thence west to 8th Street, thence south to Lusher Avenue, thence west to Oakland Avenue, thence north to the place of beginning; also, the townships of Jackson,

Morgan, Pleasant, Pine, and Washington in Porter County; also, Kankakee Township in Jasper County; also, Cass, Franklin, Rich Grove, and Tippecanoe Townships in Pulaski County; also, Aubbeenaubbee Township in Fulton County.

## FOURTH DISTRICT

The counties of Allen, DeKalb, LaGrange, Noble, Steuben and Whitley; also, the townships of Benton, Clinton, Elkhart, Harrison, Jackson, Jefferson, Locke, Middlebury, Olive, Osolo, Union, Washington and York in Elkhart County; also, all of Concord Township in Elkhart County except that part described as follows: All that part of the City of Elkhart lying in Concord Township and being north of the right of way of the New York Central Railroad Company, and also a part thereof beginning at the intersection of Oakland Avenue and the right of way of the said New York Central Railroad Company, and running northeasterly along and with said right of way to South Main Street, thence southeasterly along and with said street to Hickory Street, thence southwesterly along and with Hickory Street to South 6th Street, thence south to West Indiana Avenue, thence east to Benham Avenue, thence south to Wolf Avenue, thence west to 8th Street, thence south to Lusher Avenue, thence west to Oakland Avenue, thence north to the place of beginning.

## FIFTH DISTRICT

The counties of Adams, Grant, Jay, Huntington, Madison, Miami and Wells; also, the townships of Harrison, Licking and Washington in Blackford County; also, the townships of Center, Clay, Ervin, Harrison, Honey Creek, Howard, Jackson, Liberty, Monroe and Taylor in Howard County.

## SIXTH DISTRICT

The counties of Boone, Clinton, Johnson and Montgomery; also, the townships of Brown, Center, Eel River, Guilford, Liberty, Lincoln, Marion, Middle, Union and Washington in Hendricks County; also, the townships of Baker, Brown, Greene, Harrison, Jackson, Madison, Monroe, Ray and Washington in Morgan County; also, the townships of Pike, Washington, Decatur, Perry and Franklin in Marion County; also, Warren Township in Marion County except a part thereof beginning at the northwest corner of said township and running thence south to 25th Street, thence east to Hawthorne, thence south to 21st Street, thence east to Ritter Avenue, thence north to the right of way of the C.C.C. & St.L. Railroad, thence northeasterly along said railroad right of way to Arlington Avenue, thence north to the township line of said Warren Township, thence west to the place of beginning.

## SEVENTH DISTRICT

The counties of Brown, Clay, Daviess, Fountain, Greene, Martin, Monroe, Owen, Parke, Putnam, Sullivan, Vermillion, Vigo, and Warren; also, the townships of Bolivar, Center, Gilboa, Grant, Hickory Grove, Oak Grove, Parish Grove, Pine, Richland and York in Benton County; also, the townships of Jackson, Lauramie, Randolph, Sheffield, Shelby, Union, Wayne and Wea in Tippecanoe County; also, the townships of Clay and Franklin in Hendricks County; also, the townships of Adams, Ashland, Clay, Gregg and Jefferson in Morgan County; also, the townships of Widner, Vigo and Steen in Knox County.

## EIGHTH DISTRICT

The counties of Crawford, Dubois, Floyd, Gibson, Harrison, Perry, Pike, Posey, Spencer, Vanderburgh and War-

rick; also, the townships of Busseron, Decker, Harrison, Johnson, Palmyra, Vincennes and Washington in Knox County.

## NINTH DISTRICT

The counties of Bartholomew, Clark, Dearborn, Fayette, Franklin, Jackson, Jefferson, Jennings, Lawrence, Ohio, Orange, Ripley, Scott, Shelby, Switzerland and Washington; also, the townships of Adams, Clay, Clinton, Jackson, Marion, Salt Creek, Sand Creek and Washington in Decatur County.

## TENTH DISTRICT

The counties of Delaware, Hamilton, Hancock, Henry, Randolph, Rush, Tipton, Union and Wayne; also, Fugit Township in Decatur County; also, Lawrence Township in Marion County, also, a part of Warren Township in Marion County described as follows: Beginning at the northwest corner of said township and running thence south to 25th Street, thence east to Hawthorne, thence south to 21st Street, thence east to Ritter Avenue, thence north to the right of way of the C.C.C. & St.L. Railroad, thence northeasterly along said railroad right of way to Arlington Avenue, thence north to the township line of said Warren Township, thence west to the place of beginning; also, a part of Center Township in Marion County described as follows: Beginning at the northeast corner of said township, and running thence west on 38th Street to Dearborn Street, thence south to 34th Street, thence east to Gale Street, thence south to 33d Street, thence in a southeasterly direction along 33d Street to Sherman Drive, thence south to 30th Street, thence east to Emerson Avenue, thence north to the place of beginning; also, Jackson Township of Blackford County; also, Union Township of Howard County.

## ELEVENTH DISTRICT

Wayne Township of Marion County; also, Center Township of Marion County, except a part of said Center Township described as follows: Beginning at the northeast corner of said township, and running thence west on 38th Street to Dearborn Street, thence south to 34th Street, thence east to Gale Street, thence south to 33d Street, thence in a southeasterly direction along 33d Street to Sherman Drive, thence south to 30th Street, thence east to Emerson Avenue, thence north to the place of beginning.

All references are to existing lines as the same were established and fixed on December 31, 1960.

PREME COURT, U. S.

FILED
APR 13 1968
DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1263

ROGER D. BRANIGIN, EDWIN M. S. STEERS, THURMAN M. DEMOSS, AS MEMBERS OF THE STATE ELECTION BOARD OF INDIANA, JOSEPH W. SUMMERS,

*Appellants,*

*vs.*

NELSON G. GRILLS, DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

## MOTION TO AFFIRM.

LESLIE DUVALL,
WILLIAM H. SPARRENBERGER,
*Attorneys for Appellees Duddleston, Gallagher, Marshall and Mundy.*

SPARRENBERGER, DUVALL, TABBERT & LALLEY,
*Attorneys at Law,*
1126 Fidelity Building,
Indianapolis, Indiana 46204,
639-5444.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1263

ROGER D. BRANIGIN, EDWIN M. S. STEERS, THURMAN M. DEMOSS, AS MEMBERS OF THE STATE ELECTION BOARD OF INDIANA, JOSEPH W. SUMMERS,

*Appellants,*

*vs.*

NELSON G. GRILLS, DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

## MOTION TO AFFIRM.

Appellees move the Court to affirm the judgment sought to be reviewed on the appeal of Joseph W. Summers on the ground that it is manifest that the questions on which the decisions of the cause depends are so unsubstantial as not to need further argument.

Rule 16(1)(c) authorizes filing a Motion to Affirm the judgment sought to be reviewed on appeal from a Federal Court for the above stated cause.

## I. NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED BY APPELLANT JOSEPH W. SUMMERS.

Rule 15(1)(f) requires "a statement of the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution." Appellant Summers alleges four questions (Appellant Summers' Jurisdictional Statement page 3). These four questions express in different language the following basic proposition: Where a state law establishing congressional districts has been ruled unconstitutional and a Federal District Court is requested to establish districts in lieu thereof, the Court has *no* power other than to maintain the existing, albeit unconstitutional, congressional districts making only such population adjustments between them as will result in a *de minimus* variance from the optimum. The necessary corollary to this proposition is that *no consideration whatsoever* can be given to the integrity of county lines or other governmental units, historical patterns or geographic boundaries. Appellant Summers includes language in his question number 4 questioning the District Court's right "to disrupt a congressional district created by the Legislature of a homogeneous group consisting of negroes and low income persons other than removing from such legislative created district the overpopulation of 9,210 persons to an adjoining underpopulated district." There is no allegation of racial gerrymandering such as that alleged in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). In Section V sub-paragraph 3 he discusses disturbing the heart of homogeneous district in the same fashion as he discusses any other district, *e.g.* that the Court should only make "as little adjustments as are necessary to bring the districts in line with Article I, Section 2." (Jurisdictional Statement, page 8.)

Therefore, Appellees conclude that Appellant Summers,

despite his language of homogeneous groupings intends to raise no issue here other than the same issues raised in his first three questions.

The essence of Appellant Summers' position is that county lines cannot be considered for any purpose whatsoever in drawing congressional districts. Appellant's proposition has no basis in law either as announced by this Court or by six Federal Districts which have, in fact, redistricted. This motion is not the place for detailed examination of all these Federal Court redistricting decrees. Brief examination of the Maryland case, which this Court has reviewed and approved, will suffice. *Maryland Citizens Committee etc.* v. *Tawes,* 253 F. Supp. 731 (D. Md. 1966) affirmed sub nom.; *Alton* v. *Tawes,* 384 U. S. 315.

Maryland has twenty-one counties. Of these twenty-one, boundary line integrity of only three was violated. Two very large counties, Montgomery (340,000) and St. Georges (357,000) were not split. The only three counties that were split were Baltimore, Anne Arundel and Howard Counties. Baltimore County had to be split because of its excessive population. Anne Arundel and Howard are both adjacent to Baltimore County and had to be added to residual portions of Baltimore County to complete districts. The First District consists of the Bay area counties which are sparsely populated. The three-judge panel in the Maryland case expressly removed Harford County from the old First District and added Calvert and St. Marys Counties (along with part of Anne Arundel County) to form the new First District. Under Appellants' novel theory the Maryland Court could not have made any changes in the old First District except to add sufficient population to bring that district from 14.9% below the optimum up to the optimum. This could have been done by pulling population out of Baltimore County, since Harford County (part of the old First District) is adjacent to Baltimore County and since

Baltimore County had to be divided in any event. The District Court's *rejection* of such an approach was necessarily approved by this Court in *Alton* v. *Tawes*. The three-judge panel in the Maryland case stated:

> "Some departure from the ideal is, of course, inevitable. The equality which the Constitution commands allows, however, only minor deviations which may occur in the recognition of rational and legitimate factors, free from the taint of arbitrariness, irrationality and discrimination." (Page 733)

On page 734 of that Opinion, the Court stated:

> "A basic goal has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city. We think that our plan makes the districts as compact as possible and in the few cases where it was deemed necessary to split a county, we have taken into account the character of the neighborhoods involved."

Appellants' unusual theory, that county lines can be given *no consideration whatsoever*, flies in the face of this Court's decision in *Reynolds* v. *Sims*, 84 S. Ct. 1362 (1964), page 1391:

> "A state may legitimately desire to maintain the integrity of various political subdivisions insofar as possible and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting without any regard for political subdivisions or natural or historical boundaries may be little more than an open invitation to partisan gerrymandering."

While it must be admitted that Congress has not, as yet, devised a formula to ensure compact and contiguous districts, the desirability of obtaining such a formula is un-

questioned. A quick look at the dissenting judge's map of grotesquely formed districts side by side with the majority's map of compact and regularly formed districts provides eloquent testimony in support of the language of this Court quoted from *Reynolds* v. *Sims* and the stamp of approval placed by this Court on *Maryland Citizens Committee* v. *Tawes.*

*Reynolds* v. *Sims,* 84 S. Ct. 1362 and *Wesberry* v. *Sanders,* 84 S. Ct. 526 do *not* support the proposition that it is improper to give *any* consideration to county lines in drafting congressional districts.

Appellant Summers (Appellant's Jurisdictional Statement, page 6) points out four instances in the history of the State of Indiana when county lines have been broken. Two of these instances were found in the Acts of 1965, Chapter 205, subsequently held to be unconstitutional. Three of the four instances involved Marion County which by virtue of its concentration of population must be split. In no instance in the entire history of the State of Indiana has any county been divided into more than one congressional district other than the counties of Lake and Marion. It is conceded that the population of these two counties requires division and the Federal Court plan so provides. Appellant Summers cannot say that Indiana has no consistent policy against dividing counties into different congressional districts.

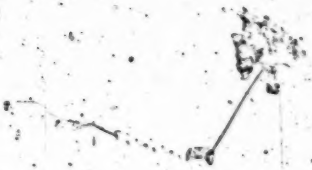
The number of counties switched or the population transferred is of no relevance. In the State of Illinois, 14 counties were transferred outside of Cook County. *People* v. *Kerner,* 33 Ill. 2d 460, 211 N. E. 2d 736 (1965) U. S. District Court participated. In the case of Tennessee, 23 out of 96 counties were moved to obtain a four percent (4%) variation. *Baker* v. *Ellington,* 273 F. Supp. 174 (M. D. Tenn., 1967). In Tennessee, only one county (Shelby County, the home of Memphis, Tennessee) was split.

WHEREFORE, Appellees submit that the decision of the three-judge Federal Court from which the Appeal by Appellant Summers has been taken should be affirmed in all things without plenary consideration.

Respectfully submitted,

LESLIE DUVALL,
WILLIAM H. SPARRENBERGER,
*Attorneys for Appellees Duddleston, Gallagher, Marshall and Mundy.*

SPARRENBERGER, DUVALL, TABBERT & LALLEY,
*Attorneys at Law,*
1126 Fidelity Building,
Indianapolis, Indiana 46204,
639-5444.



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BRANIGIN ET AL. *v.* DUDDLESTON ET AL.; and
SUMMERS *v.* DUDDLESTON ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

Nos. 1252 and 1263. Decided May 20, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN, for reasons contained in his memorandum of March 4, 1968, in which he acquiesced in the denial of stays of enforcement of the District Court's judgment, also acquiesces in the Court's affirmance of that judgment.